

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS  
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

IN THE MATTER OF: \*  
MID-ATLANTIC PETROLEUM \*  
PRODUCTS, LLC \*  
Petitioner and Appellee<sup>1</sup> \*

Mr. Carlos Horcasitas \*  
Mr. Stephen Crum \*  
Mr. Carl E. Neuberg \*  
For the Petitioner \*  
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Attorney for Petitioner/Appellee \*

\*\*\*\*\*

Mr. David Niblock \*  
Department of Permitting Services \*  
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Attorney for the Department \*  
of Permitting Services \*

\*\*\*\*\*

Brookeville Ventures, LLC \*  
Appellant \*  
Norman Knopf, Esquire \*  
Attorney for Brookville Ventures \*

Mr. Robert B. Gould \*  
Mr. Stephen R. Grayson \*  
Mr. John Straughan \*  
Mr. Robert Wilkoff \*

Opposing the Modification Petition \*  
and Pursuing Administrative Appeals \*

\*\*\*\*\*

Before: Martin L. Grossman, Hearing Examiner  
Lynn A. Robeson, Hearing Examiner<sup>2</sup>

BOA Case No. S-2351-A  
(OZAH No. 03-58)  
BOA Case Nos. A-5787, A-5794, A-5832,  
A-5886, and A-5917

**HEARING EXAMINERS' REPORT AND RECOMMENDATION**

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<sup>1</sup> Petitioner is also the Appellant in one of the administrative appeals, BOA Case No. A-5794, an appeal of a stop-work order issued by the Department of Permitting Services ("DPS").

<sup>2</sup> Some hearings in this case were conducted by former Hearing Examiner Françoise Carrier, and the current Hearing Examiners reviewed that record.

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Appendix A (Summary of the Case)

Appendix B (Chronology of the Case)

## **I. FACTUAL BACKGROUND**

Unlike a rose, this case illustrates that a parking space is not a parking space is not a parking space.<sup>3</sup>

This matter involves both a request to modify an existing special exception regarding a filling station (S-2351-A) and five administrative appeals regarding an office building (A-5787, A-5794, A-5832, A-5886 and A-5917). The site is designated “Parcel E” on a record plat approved by the Planning Board on February 23, 1995. Exhibit 90.<sup>4</sup> The subject property is located at 12301 and 12311 Middlebrook Road, Germantown, Maryland, within the I-1 Zone.<sup>5</sup>

Brookeville Ventures, LLC (“BV”), the original developer of MAPP’s property, initially recorded a plat covering an area which currently consists of three recorded lots, including Parcel E. Exhibit 90; T. 206-208 (11/18/10). BV divided the area subject to the plat into three tax account parcels. T. 207 (11/18/10). MAPP purchased Parcel E, consisting of 1.94 acres. Exhibit 52, T. 206-208 (11/18/10). BV retained ownership of the adjacent parcel to the west (Parcel A), on which BV had developed an office building. T. 208 (11/18/10). The remaining original tax account parcel (Parcel C) is owned by a third entity not a party to this appeal. In 1995, BV resubdivided the property to convert the original tax account parcels into record lots. Exhibit 90; T. 208-209 (11/18/10).

On November 2, 1998, the Board of Appeals unanimously approved a special exception, pursuant to Section 59-G-2.06 of the Zoning Ordinance, for a gas station, car wash and

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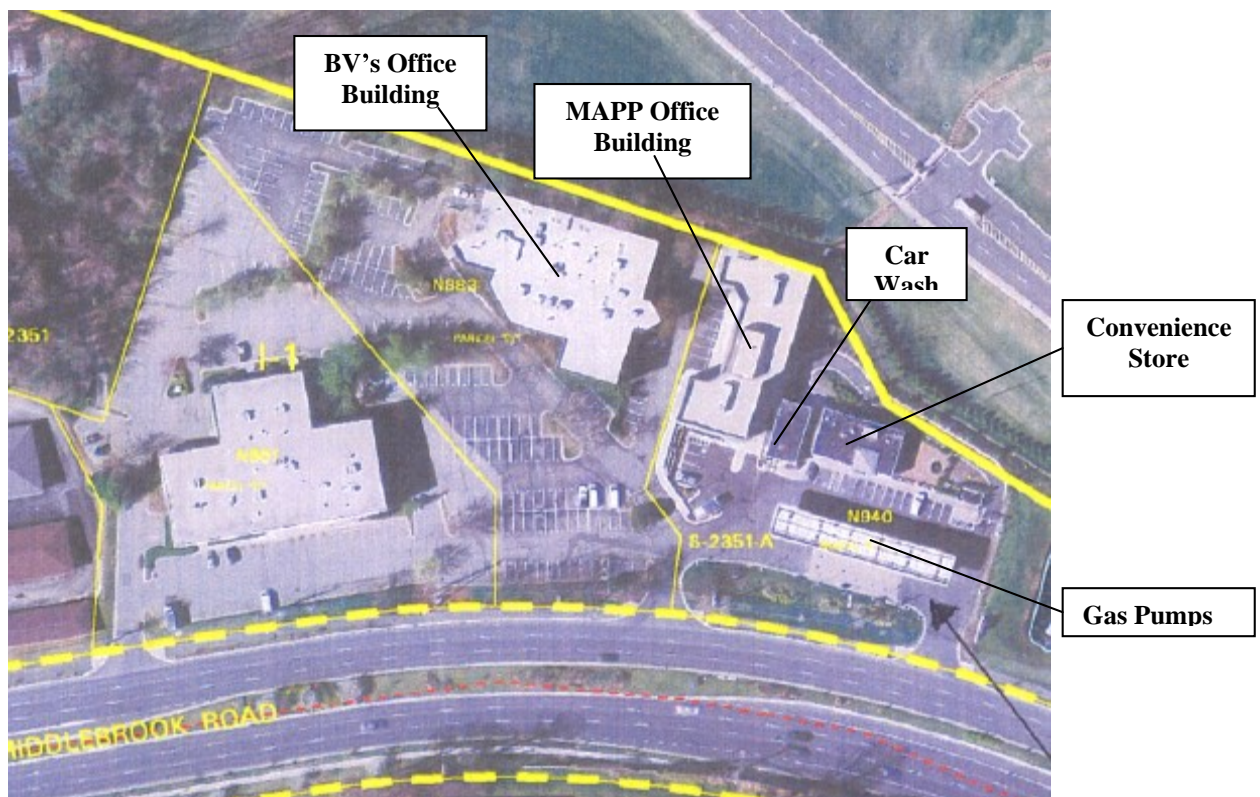
<sup>3</sup> In *McKemy v. Baltimore County*, 39 Md. App. 257, 258 (1978), the Court wrote, “Gertrude Stein once said that a rose is a rose is a rose, and no one appealed. Here, the Circuit Court for Baltimore County has held that a parking lot is a parking lot is a parking lot, and both sides have appealed.”

<sup>4</sup> All references to exhibit numbers are to exhibits contained in S-2351-A unless otherwise noted. References to the transcript are followed by the date of the applicable public hearing. In many instances, there are duplicate exhibits in the various case files. Reference will be made only to one exhibit.

<sup>5</sup> Because of the length of the record in this case, a Chronology of the Case listing the parties’ actions over the years is attached to this report as Appendix B; however, the salient background is set forth above. A summary of the testimony is attached to this report as Appendix A.

convenience store filed by Mid-Atlantic Petroleum Properties, LLC (“MAPP”). Exhibit 29, S-2351. The area subject to the special exception consists of approximately 1.45 acres (“Special Exception Area”) on Parcel E. Exhibit 52. The easternmost portion of the Special Exception Area contains a stormwater management facility serving both BV and MAPP’s properties. Exhibit 52.

In addition to the gasoline service station, convenience store and carwash, MAPP developed an office building on approximately .45 acres of the western portion of Parcel E (“Office Building Area”). Exhibit 52. BV’s office building adjoins the western edge of the Office Building Area. An aerial photograph included in the Technical Staff Report for the special exception (Exhibit 52, shown below), shows (from right to left) the location of the stormwater management pond, the gasoline service station and accessory uses, MAPP’s office building, and BV’s office building. The arrow in the photograph marks the Special Exception Area. Exhibit 52. In its 1998 special exception plan, MAPP depicted a 6,500 square dry cleaning facility in the Office Building Area. Exhibit 4(a).



The record reflects that the parties co-existed peacefully until 2002, when MAPP commenced construction of its office building adjoining the eastern side of BV's property. The office building consisted of approximately 17,500 square feet of gross floor area. Exhibits 55, 130(i), 152. The amount of parking required for the office building, and whether setbacks for the building had been properly calculated, formed the basis for the following appeals (and one judicial action not before the Board) lasting almost 10 years:

1. A-5787: BV's appeal of the building permit for the office building;
2. A-5794: Horcasitas' (MAPP's) appeal of DPS's Issuance of Stop Work Order;
3. A-5832: BV's Appeal of DPS's Decision to Lift the Stop Work Order on the Office Building;
4. A-5886: BV's Appeal of DPS's Decision Not to Issue a Stop Work Order and Not to Revoke the Building Permit; and
5. A-5917: BV's Appeal of Use and Occupancy Permit.

At the center of this appellate vortex lay the parties' differing interpretations of private covenants imposed by BV during its initial subdivision approval for the large record lot divided into tax account parcels. Exhibit 91. These covenants related to parking and included cross-easements governing ingress to parking areas between the parcels. According to BV, the covenants were placed on the property in order to proceed with development during a moratorium on subdivision in the 1980's. BV sought to take advantage of an exemption from the moratorium for lots which had not been subdivided for 40 or 50 years. T. 206-207 (11/18/10). BV divided the entire area subject to the original plat into three tax account parcels. At the time it was recorded, there was only limited access from the large record lot onto Middlebrook Road. T. 207 (11/18/10). BV created the covenants to allow passage from one tax account parcel to the other and to have non-exclusive parking. T. 208 (11/18/10). According to

BV, the covenants provide that any parcel owner had the right to declare the parking spaces on its parcel exclusive to their use, so the covenants permitted only a conditional joint parking agreement. T. 207-208 (11/18/10).

According to MAPP, the covenants permitted parking anywhere on any of the three parcels to support the uses developed within the original record plat. MAPP believed that the covenant “provides a non-exclusive easement to use any parking space on the property” except in certain for spaces designated by BV for certain uses. Exhibit 3, Case No. A-5794.

The record indicates that at some time in early 2002, MAPP submitted its construction plans for the office building to BV prior to commencement of construction. The plans showed 14 parking spaces on MAPP’s Office Building Area, although according to MAPP, 35 parking spaces were required by the Zoning Ordinance. Exhibit 26, p. 4, A-5794; Exhibits 55(d), 130. In April, 2002, BV informed MAPP that the private covenants did not permit MAPP to utilize parking located on the other parcels within the larger area of the original record plat. Exhibit 9(j), A-5832. Undeterred, MAPP continued with its construction plans and in May, 2002, DPS issued a building permit for MAPP’s office building. Exhibit 4, A-5787. BV then filed a complaint with DPS asserting that the covenants did not permit parking for the office building outside of Parcel E. Faced with BV’s complaint, DPS reversed its decision to approve the building permit and issued a Stop Work Order to MAPP. Exhibit 117.

MAPP appealed DPS’s issuance of the stop work order in June, 2002, thereby generating the second administrative appeal in this case. Exhibit 1, A-5794. In support of its appeal, MAPP submitted the same private covenants that BV used to support its claim that parking for the office building did not meet the requirements of the Zoning Ordinance. Exhibit 8, A-5794; T. 97 (11/18/10).

In an attempt to rectify any lack of parking on the Office Building Area, MAPP submitted a request for a minor modification of its special exception in July, 2002. Exhibit 31(b), S-2351. The purpose of the modification request was to provide parking for the office building within the Special Exception Area. Exhibit 31(b). At about the same time, MAPP initiated a declaratory judgment action in the Circuit Court requesting the Court to decide whether MAPP's interpretation of the covenants or that of BV was correct. Exhibit 22, A-5794.

The Board of Appeals granted the MAPP's minor modification request on October 2, 2002. Exhibit 35, S-2351. BV immediately filed an objection to the Board's decision. Exhibit 109. In support of its objection, BV submitted letters to Board and to DPS requesting an investigation of numerous alleged violations of MAPP's special exception approval. Exhibit 109, S-2351-A; Exhibits 18, 19, and 20, A-5787.

While BV was objecting to the minor modification granted by the Board, DPS lifted the stop work order on MAPP's office building due to the Board's approval of the minor modification. Exhibit 23, A-5787. DPS's action lifting the stop work order generated a third administrative appeal filed by BV on October 8, 2002. Exhibit 9(g), A-5832.

During this flurry of litigious sparring by the parties, the County filed a request for continuance of the Case Nos. A-5787 and A-5794 to permit the Circuit Court to determine the correct legal interpretation of the parking covenants. Exhibit 22, A-5794. In its Motion for Continuance, the County stated its position that the Board of Appeals did not have jurisdiction to resolve the interpretation of the covenants. Exhibit 22, A-5794. MAPP joined in the County's request for continuance, which BV opposed. Exhibits 23 and 24, A-5794.<sup>6</sup> MAPP renewed its

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<sup>6</sup> At this point, the Board of Appeals had already consolidated Case Nos. A-5787 and A-5794. Exhibit 31, A-5794. Both cases were scheduled for a hearing on October 16, 2002.

request for a continuance of the new hearing date to permit additional time for MAPP to revise its special exception. Exhibit 7, A-5787. Initially, the Board denied the request for continuance. Exhibit 38, A-5787. Later, faced with the third administrative appeal, the Board of Appeals rescheduled the public hearing in A-5787 and A-5794 to January 22, 2003 and scheduled the public hearing in A-5832 for the same date. Exhibit 9, A-5787; Exhibit 4(b), A-5832.

BV next attempted to stop the continuing construction of the office building by contacting Ms. Susan Scala-Demby, Permitting Services Manager for DPS, requesting reinstatement of the Stop Work Order. BV informed Ms. Scala-Demby that the Board of Appeals had rescinded its approval of the MAPP's minor modification request. Exhibit 22, A-5787.

With regard to the special exception approval, DPS agreed, in a letter dated October 22, 2002, to investigate BV's complaint regarding violations of the special exception approval. Exhibit 42, S-2351. Meanwhile, the Board of Appeals suspended its approval of MAPP's minor modification request and, by notice dated October 25 and October 29, 2002, scheduled a public hearing on the modification request for January 22, 2003, the same date of the public hearing for the administrative appeals. Exhibits 38 and 39, S-2351.<sup>7</sup>

As the new year dawned, the three administrative appeals (BV's appeal of the building permit, MAPP's appeal of the stop work order, and BV's appeal of DPS's decision to lift the stop work order) as well as MAPP's request to modify its special exception were scheduled for hearing on January 23, 2010. On January 10, 2003, MAPP again requested a continuance, stating that it needed more time to revise its special exception plan to include parking for the

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<sup>7</sup> At this point, all administrative appeals that had been filed were also scheduled for public hearing on January 22, 2003. Exhibit 38, A-5787.



office building within the Special Exception Area. Exhibit 11, A-5787. BV opposed this request because MAPP continued to construct the office building. Exhibit 38, A-5787.

With regard to the special exception, DPS remained true to its earlier commitment to BV and did investigate the special exception violations alleged by BV. On January 24, 2003, it issued a Notice of Violation to MAPP for making exterior changes to the building without approval from the Board of Appeals. Exhibit 52, Attachment D. The notice listed several corrective actions, listed below (Exhibit 29):

1. Return interior floor layout as approved in the record.
2. Remove the stone patio and fountain along with the existing door on the building's right side.
3. Remove all exterior wall mount fixtures, installing only double mounted directional 100 watt wall fixtures in areas delineated on M-NCPPC 8-18-99 plan.
4. Install all plantings per said plan.
5. Remove the ATM and its illuminated roof structure.
6. Provide to the Department actual height of the canopy.
7. Remove all canopy fixtures to be replaced with 7 recessed fixtures as per plan;
8. Reduce the size of the trash enclosure to 10'x15'.
9. Remove existing parking lot striping and mark lot as approved.

On April 8, 2003, MAPP filed a request for a major modification to its special exception approval, showing parking for the office building within the Special Exception Area. Exhibit 3.

Meanwhile, turning its attention back to the office building, BV added two more items to its initial complaint, alleging in a letter to DPS that the office building violated the side and rear setbacks for the I-1 Zone and requesting reinstatement of the stop work order. Exhibit 4(b), A-5886. For reasons not revealed by the record, DPS refused to grant BV's request to reinstate the stop work order and revoke the building permit, resulting in a fourth administrative appeal filed by BV filed on April 14, 2003. Exhibit 1, A-5886.

On April 16, 2003, the Board of Appeals, “in the interest of clarity and efficiency”, granted MAPP’s request for continuance of all the administrative appeals over BV’s objection. Exhibit 39, A-5787. It also found that its calendar could not accommodate all of the appeals and referred both the special exception modification (S-2351-A) and all pending administrative appeals to the Hearing Examiner. Exhibit 39 (A-5787). By notice dated June 10, 2003, the Hearing Examiner set a new public hearing date of July 30, 2003. Exhibit 41, A-5794.

Undaunted by the plethora of appeals, MAPP continued construction of the office building. DPS acknowledged that it had erred in issuing the building permit because the building was constructed approximately 4-5 feet from the property line, in violation of Section 59-C-5.33 of the Zoning Ordinance. T. 104 (11/18/10); T. 171 (10/29/10). That section does not require any setback from an adjoining property within the I-1 zone *unless* a yard is provided. In the case where a yard is provided, Section 59-C-5.33 mandates that, “it shall not be less than 10 feet in width.”

On June 12, 2003, DPS issued a building permit for a permanent awning on part of the western side of the building which extended to BV’s adjoining lot line. Exhibit 88. According to DPS, the awning cured the setback problem because setbacks were measured from the closest point of the building to the property line, even if the awning extended from only a portion of the building. T. 107-108 (11/18/10).

Approximately one and one-half weeks after it issued the awning permit, DPS issued a certificate of occupancy for the office building. Exhibits 1 and 3, A-5917. During this time period, BV submitted a request to DPS to limit occupancy of the office building to 4,000 square feet until the appeals were resolved. Exhibit 43, A-5787. According to BV, the 4,000 square feet represented the amount of office space that could be supported by the 14 on-site parking

spaces. Exhibit 43, A-5787. DPS's issuance of the occupancy certificate resulted in the final administrative appeal by BV, filed on June 27, 2003. Exhibit 1, A-5917. On July 9, 2003, the Board resolved to consolidate this last appeal with the four other appeals, expedite the public hearing and refer the administrative appeal to the Hearing Examiner. Exhibit 5, A-5794.

Just prior to the July 30 public hearing, MAPP requested a continuance of the hearing date in order to amend its special exception modification to address concerns raised by Technical Staff. Exhibit 18. BV again opposed the continuance. Exhibit 19. On July 24, 2003, MAPP submitted an amendment to its special exception petition. Exhibit 21. The public hearing before the Hearing Examiner was reset for October 2, 3, and 10, 2003. Exhibit 22.

Technical Staff of the Maryland-National Park and Planning Commission ("M-NCPPC") recommended denial of MAPP's request to modify its special exception to add parking for the office building within the Special Exception Area. Exhibit 31. In order to address the negative recommendation, MAPP filed another amendment to its special exception petition. Exhibit 27. Despite these modifications, on September 24, 2003, the Planning Board recommended denial of MAPP's request to amend the petition to place parking for the office building within the Special Exception Area. Exhibit 32.

The October 2, 2003, public hearing before former Hearing Examiner Françoise Carrier proceeded as scheduled. During the hearing, the parties agreed to continue all the administrative appeals and the special exception modification to permit the Circuit Court to decide the interpretation of the covenants. The Hearing Examiner granted the continuance request, and requested DPS to revise the Certificate of Occupancy to limit occupancy of the office building to no more than 4,666 square feet. T. 67 (10/2/03).

While the judicial action was pending, DPS issued a building permit to convert the lower floor of the office building to an interior parking garage in October, 2005. Exhibit 94. BV did not appeal this permit. Based on the increased number of parking spaces, MAPP eventually leased approximately 1,000 square feet of space to a pizza shop. T. 151-153 (10/29/03).

It was not until January 9, 2008, that the Maryland Court of Special Appeals issued its decision regarding the interpretation of the covenants, ending MAPP's judicial action. Exhibit 40(a). The court upheld BV's interpretation of the covenants, *i.e.*, that parking on the area subject to the original record plat was exclusive if the lot owner so chose and that parking for the uses on each lot had to be provided within the lot. Exhibit 40. The litigants then returned their attention to the administrative front.

On April 14, 2008, BV filed a Motion to Recommence Proceedings for both the special exception and the consolidated administrative appeals. Exhibit 40. Approximately three weeks later, MAPP filed a response to BV's Motion requesting a pre-hearing conference to clarify the issues on appeal. Exhibit 41. Nothing further happened until December 18, 2008, when BV filed a Second Motion to Recommence Proceedings. Exhibit 41(a). MAPP responded by requesting additional time to submit a modification of the special exception because it had engaged a new engineer to work on the matter. Exhibit 41. On January 30, 2009, MAPP filed revisions to its special exception approval requesting modifications to address the violations listed in the Notice of Violation and as-built conditions on the site. The revisions did not propose to include parking for the office building within the Special Exception Area. These modifications did include:

1. Revisions to the outdoor lighting plan;
2. Revisions to the lighting under the fueling station canopy;

3. Revisions to the trash enclosure;
4. Revisions to the approved floor plan for the convenience store;
5. Revisions to the landscape plan; and
6. An increase in the height of the canopy.

Exhibit 43. The Hearing Examiner issued a Notice of Motion to Amend the Petition on March 12, 2009, and rescheduled the public hearing for July 20, 2009. Exhibit 47. Subsequently, MAPP filed a motion to amend the petition to include as-built wall light fixtures that had been installed. Exhibit 48. Technical Staff recommended approval of the modifications requested with six conditions:

1. All terms and conditions of the previously approved special exception remain in full force and effect, except as modified by approval of this modification.
2. The gasoline station may remain open 24 hours per day, 7 days a week, and the convenience store will operate with the same hours, but only be open for public access to the interior between 6:00 a.m. and midnight. The carwash hours shall be 8:00 a.m. to 8:00 p.m. daily, 7 days a week.
3. The landscape plan must be revised to incorporate the following improvements to the landscape strip adjacent to the public right-of-way for review and comment by Planning Board staff and transmitted for approval by the Board of Appeals:
  - a. Install 2 new little Leaf Lindens, 2½ -3" caliper to much [sic] the existing tree species within the public right-of-way, where the horizontal spaces permit, approximately 45 feet on center to either side of the existing bike path.
  - b. Supplement the existing Juniper hedge with 2-foot-high, evergreen shrubs—install at 3' or they should be able to grow to 3'.
  - c. Provide 2 additional 2½ -3' caliper Zelkova shade trees, increasing the proposed 3 Zelvokas to 5 Zelkovas.
4. The gate for the dumpster enclosure must be repaired and painted with green to blend with the evergreen trees around it.
5. The height of the canopy over the pump islands must not exceed 17' 10" on the west end and 21 feet and 8 inches on the east end as shown on the plan.
6. The canopy lighting must be modified by reducing the number of bulbs, installing deflectors, or reducing the wattage to achieve an average of less than 20 foot candles to ensure compatibility with adjacent uses and lower direct glare as seen

from Middlebrook Road. All lamps must be recessed within the ceiling of the canopy. Exhibit 52.

The Planning Board, on July 9, 2009, recommended approval of the modifications (Exhibit 58) with six conditions contained in the Technical Staff Report, and one additional condition as follows:

7. No exterior or interior seating shall be provided for use by the patrons of the convenience store.<sup>8</sup>

On the date originally set for the public hearing, MAPP submitted another set of revisions to the special exception plan to incorporate the conditions recommended by the Planning Board. Exhibit 57. Technical Staff advised that MAPP's revised lighting and landscape plans conformed to the Planning Board's conditions of approval. Exhibit 59. The Hearing Examiner issued notice of these amendments and rescheduled the public hearing for October 5 and 6, 2009. Exhibit 60.

Prior to the rescheduled hearing, Montgomery County filed a Motion to Dismiss Appeal No. A-5886, alleging that the setback violations alleged had not been properly raised in the initial appeal form or Charging Document. Exhibit 64.

The October 5, 2009, public hearing proceeded as scheduled, but the parties requested another continuance to April 12, 2010, to permit additional time for a settlement of the cases. T. 4-6 (10/9/09). In March, 2010, BV notified the Hearing Examiner that the parties had been unable to reach a settlement. Exhibit 70.

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<sup>8</sup>At the public hearing before the Hearing Examiner, BV and MAPP both submitted evidence that MAPP had used the patio area for sit-down consumption of food on the premises. T. 99-100, 274 (10/29/10).

The April 12, 2010, public hearing was postponed until June 22, 24 and July 1, 2010. Due to the departure in June of 2010 of Hearing Examiner Carrier, the Hearing Examiner postponed the June, 2010 hearing. Exhibit 78. Ultimately, the cases were rescheduled for a hearing on October 29, 2010, November 15, 2010, and November 18, 2010. Exhibit 83. These public hearings proceeded as scheduled.

Shortly before the October 29, 2010, public hearing, the County submitted a second Motion to Dismiss Case No. A-5886, alleging that State law prohibits litigation of setback violations more than five years after the permit is issued. Exhibit 85. Because the administrative appeals had now stretched well beyond that period and BV had focused on pursuing the appeals administratively rather than through the Courts, the County asserted that the State law precluded any further appeal of the setback violations for the office building. Exhibit 85. BV then filed a Supplemental Response to the County's 2009 Motion to Dismiss and a Response to the County's Second Motion to Dismiss. Exhibit 101, 102. Immediately after BV's response, MAPP filed a memorandum supporting the County's Motions to Dismiss. Exhibit 103.

A central issue during the October 29<sup>th</sup>, the November 15<sup>th</sup>, and the November 18<sup>th</sup> public hearings was the required number of parking spaces for the convenience store and the car wash. T. 146-165 (10/29/10); T. 200-219 (11/15/10); T. 32-87 (11/18/10). Ultimately, the parties agreed with the Hearing Examiner's interpretation of the Zoning Ordinance and reached agreement that three additional spaces should be incorporated into the special exception site. T. 72-87 (11/18/10). BV's agreement was subject to a condition that the new spaces should be occupied by MAPP's employees, leaving the spaces closer to the convenience store for patrons. At the Hearing Examiner's request, MAPP submitted two alternative layouts to Technical Staff, noting BV's preferred layout for the special exception parking. Staff responded recommending

approval of BV's preferred parking layout, shown on Exhibit 114(b), and BV no longer objects to approval of the revised special exception modification, but does request that a condition relating to employee parking be included in the special exception approval.

Conflict still reigned, however, regarding the required parking for the office building and whether the office building met the side and rear setbacks of the I-1 Zone.

## **II. THE ADMINISTRATIVE APPEALS**

### **A. Motions to Dismiss**

DPS and MAPP claim that the Board of Appeals has no jurisdiction over the setback violations raised in Case Nos. A-5832 and A-5886 on several grounds. In addition, MAPP claims that the intervening building permits for the awning and the interior parking garage preclude the Board from reviewing the side-yard setback and parking requirements. The Hearing Examiners conclude that BV's claims regarding the office building setbacks and parking are properly before the Board.

MAPP and the County argue that the setbacks are not properly before the Board because those claims were not raised in the original appeal of the building permit. Exhibits 64, 72. DPS states that all errors of law must be set forth in the initial "Charging Document" or administrative appeal petition. In support of its position, DPS cites Section 8-23 of the County Code, which requires a person to appeal a permit within 30 days of the date it is issued. In addition, MAPP cites *Halle v. Crofton Civic Association*, 393 Md. 131, 141-142 (1995), for the proposition that "new" issues may not be raised in a *de novo* appeal before the Board. Both the County and MAPP complain that adding "new" bases for appeal prejudices their case as they have no notice of the issues to be addressed in the appeal.



In its second Motion to Dismiss, DPS also asserts that BV's setback claims may not be raised now because of the following State law (*Md. Courts and Judicial Proceedings Code Annot.* § 5-114):

(b) In general. –

(1) A person may not initiate an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred.

(2) A governmental entity may not initiate an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred if the building or structure was constructed or reconstructed:

(i) In compliance with an otherwise valid building permit, except that the building permit wrongfully permitted the building or structure to violate a setback line restriction; or

(ii) Under a valid building permit, and the building or structure failed to comply with a setback line restriction accurately reflected in the permit.

(3) For purposes of paragraph (2)(i) of this subsection and notwithstanding any other provision of State or local law to the contrary, a building permit that was otherwise validly issued, except that the permit wrongfully permitted the building or structure to violate a setback line restriction, shall be considered a valid building permit.

The County believes that the above section renders the case moot, because the statute prohibits the County from enforcing the setback restriction. Exhibit 85, p. 1.

Finally, MAPP argues that the intervening permits for the interior parking garage and the awning preclude BV from challenging these issues in its appeal of the building permit. T. 6 (3/4/11).

BV counters these arguments by asserting that it timely appealed the building permit and it may amend its original appeal, just as one may amend a complaint in Circuit Court. In support

of its arguments, BV also relies on the *Halle* case, citing the following language from the Court's decision:

Additional evidence may be presented in the *de novo* proceedings, and the Board may impose any conditions it feels necessary to protect the public health, safety and welfare. It [*de novo* review] is appellate review mainly in the sense that a decision by the administrative hearing officer is a prerequisite to the proceedings before the Board and not in the sense that the Board is restricted to the record made before the administrative hearing officer.

Exhibit 76, p. 3. BV also points to Chapter 2A, §7(c) of the County's Administrative Procedures Act, which explicitly permits amendments to charging documents after a case has been appealed. Exhibit 101, p. 1.

Alternatively, BV claims that the appeal of the lifting of the stop work order (BA Case No. A-5886), in which it initially raised the setback violations, was based on new facts raised by BV after the building permit had been appealed and therefore is not the same decision as the building permit appeal, citing *Montgomery County v. Longo*, 187 Md. 25 (2009). Exhibit 76, p. 4.

Finally, BV asserts that the State law cited above does not render the case moot because BV timely raised the issue within the time period required by the State law. Exhibit 101. BV argues that it did initiate an action or proceeding to enforce the setbacks within three years of the permit being issued, and that the prohibition on the County's enforcement of the violation applies only to an "otherwise valid permit." Because the initial permit did not approve the required parking, BV's contends that it is not a "valid permit" under the State law. Exhibit 101, p. 5.

The Hearing Examiners conclude that the weight of authority under Maryland law supports BV's argument that it timely appealed the building permit and that the setback violations are within the purview of that original appeal.

In the *Halle* case, an applicant for a special exception appealed the decision of the Hearing Examiner denying the application due to traffic problems at the access point to the site. Under the County's Charter, the Board's appellate review was *de novo* and extended to "the issues before said Board." *Halle*, 339 Md. at 135. At the Board of Appeals, the applicant proposed an entirely different access than that presented to the Hearing Examiner. The Court of Appeals determined that the Board's *de novo* jurisdiction extended to the revised application, holding that "we have consistently treated *de novo* appeals as wholly original proceedings, with the word 'appeal' meaning simply that the proceedings are new and independent rather than strict review of the prior proceedings." *Halle*, 339 Md. at 142. When exercising *de novo* appellate jurisdiction, the Board could "review the actions of the Hearing Examiner and take any action which that officer could have taken in the original proceeding." *Id.* at 143. Because the access point to the special exception site had been the basis for the Hearing Examiner's denial, the Court found that the access had been an "issue" below and therefore, the Board had jurisdiction under the Charter to decide the new access on appeal. *Id.*

In *Board of County Commissioners for St. Mary's County v. Southern Resources Management, Inc.*, 154 Md. App. 10 (2003), the Court of Special Appeals further refined the *Halle* decision involving a statute similar to the law establishing the Board's jurisdiction in this case. In *St. Mary's County*, State law permitted the appeal of a "decision" of an administrative agency to the Board of Appeals. *Id.* at 29. The County Commissioners and the Health Department appealed the Planning Commission's approval of a subdivision which had

unexploded ordinance on the site. Neither the Commissioners' nor the Health Department's administrative appeal petitions set forth all the issues that were raised on appeal. The *St. Mary's County* court held that the appeal did not need a specific list of all issues to be raised on appeal:

We believe that *Daihl* is authority for the proposition that issues to be quasi-adjudicated need to be identified at a time and in a manner that provides notice to all parties sufficient to enable them to present evidence and argument. We do not think it stands for the proposition that, if the issues are not specified in the notice of appeal, the appeal must be dismissed. [*Id. at 29, n. 7.*]

The Board of Appeals' jurisdiction to review the administrative appeals in this case is similar to that in the *St. Mary's County* case. Section 59-A-23(a) of the Zoning Ordinance states only that a party aggrieved by the issuance of a permit or decision may appeal that decision to the Board of Appeals; it doesn't limit the Board's jurisdiction to "issues" raised below. Even were the Board limited to the "issues" raised below, it is clear that a review of the setbacks for the office building was part of the decision to issue the building permit. Mr. Niblock testified that he made an error in his initial review of the building permit and attempted to correct that error by approving the awning extending over the property line. T. 104. Further testimony indicated that he sent the construction plans to Technical Staff to ensure conformance with the subdivision approval, which included a line purporting to be the rear setback. Mr. Niblock based his decision on Technical Staff's review of the construction plans. T. 105. Because DPS's review of setbacks was part of its decision to issue the building permit, these issues were "raised below" under the *Halle* case.

Were there any doubt of the Board's ability to consider these issues, Section 8-23(a) of the County Code explicitly permits amendments to an administrative appeal petition. While these issues may not have been presented as formal amendments to the charging documents, the parties have been put on notice of these issues for quite a lengthy time. To exclude those issues

in this review would elevate “form over substance”, a theory which the *St. Mary’s County* court rejected.

Nor does the record reflect that MAPP or the County will be treated unfairly by addressing the setback issues in this case. The *St. Mary’s County* court prefaced its holding by requiring that issues be presented with sufficient time for the parties to present evidence and argument in the case. BV raised the setback violations in 2002, when it wrote several letters both to Board and to DPS outlining with specificity the same claims it raises in the public hearing commencing eight years later. Exhibits 4(a) and 4(b), A-5886. BV raised the setback violations in its appeals of DPS’s decision to lift the stop work order (Exhibit 1, A-5832), to refuse to revoke the building permit (Exhibit 1, A-5886) and its appeal of the issuance of the use and occupancy certificate (Exhibit 1, A-5917). The record is replete with both evidence and argument relating to the setback issues. *See*, T. 103-108, 155-190, T. 200-204, 210-217. Based on the record of this case, the Hearing Examiners conclude that all parties have had more than sufficient time to address issues relating to the side and rear setbacks of the building.

As noted, the County and MAPP also assert that the setback issues are barred by the three-year limitations period contained in State law. *Md. Courts and Judicial Proceedings Code Annot.* § 5-114. The Hearing Examiners conclude that the State law does not bar BV’s setback claims in this case because BV *did* initiate a proceeding, (*i.e.*, the appeals in BA Case Nos. BA A-5832, A-5886, and A-5917) “arising out of a failure of a building or structure to comply with a setback line restriction” well within the three-year period required by the law. The County and MAPP assume that the action mandated by law is a judicial action; nothing in the State law

requires such an interpretation.<sup>9</sup>

MAPP's final contention is that the intervening building permit for the awning and the building and use and occupancy permits for the interior garage preclude review of the side setback and interior parking for the office building. The Hearing Examiners disagree.

Maryland courts have held that a property owner who chooses to continue construction in the face of an appeal of a building permit does so at his own risk. *Maryland Reclamation Associates*, 414 Md. at 44-45; *City of Bowie v. Prince George's County*, 384 Md. 413 (2004). In *City of Bowie*, the Court of Appeals held "[a] developer's decision, **in the face of pending litigation**, to proceed beyond the final plat approval is undertaken at his own risk that he may, at some future time, have to cease or undo his development." *City of Bowie*, 384 Md. at 425 (emphasis in original).

Under the *Halle* decision, the Board may take "whatever action" the administrative agency could take if presented with the same evidence. *Halle*, 339 Md. at 146. In this case, the permits for the interior garage were issued while the building permit for the entire building, including setbacks and required parking, was still under appeal. Exhibits 88, 94. The evidence indicates that the interior garage permitted additional occupancy of the building, but nothing in the record indicates that it was intended to satisfy the issue presented in the appeal of the building permit—required parking for the entire building. This is evidenced by the fact that the permit for the interior garage on its face did not address permanent parking for the entire building because it did not, by any party's calculation, provide the number of parking spaces required by the Code. Exhibits 130, 152.

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<sup>9</sup> DPS took the position that BV could have filed a judicial action and then requested a stay of the judicial action until the administrative appeals were exhausted. While this would have been possible, we do not agree that BV was required to do so.

In addition, Section 8-25(f) of the *Montgomery County Code* provides:

Approval in part. The director may issue a permit for the construction of foundations or any other part of a building or structure before the entire plans and specifications for the whole building have been submitted; provided, that adequate information and detailed statements have been filed complying with all the pertinent requirements of this chapter. *The holder of such permit for the foundations or other part of a building or structure shall proceed at his own risk with the building operation and without assurance that a permit for the entire structure will be granted.* (Emphasis supplied)

This section clearly is intended to prevent partial permits from vesting until the review for the entire building is complete. Because, under *Halle*, the Board has stepped into DPS's shoes and has the ability to make the initial decision on the permit, the partial permits issued by DPS do not preclude this review.

#### **B. BOA Case No. A-5794 (Horcasitas' Appeal of Stop Work Order)**

While none of the parties has moved to dismiss Mr. Horcasitas' appeal of DPS's issuance of the stop work order, the Hearing Examiners recommend that the Board dismiss this case because it is now moot. Filed on June 28, 2002, this appeal preceded DPS's decision (on or about October 7, 2002) to lift the stop work order, generating BV's appeals in Case Nos. A-5832 and A-5886. Because the stop work order was lifted and construction of the office building was completed, the Hearing Examiners conclude that this appeal is now moot and recommend that the Board dismiss this appeal.

#### **C. BOA Case No. A-5787 (Appeal of the Building Permit)**

##### **1. Office Building Rear Setback**

The I-1 Zone requires that buildings must be set back from residentially zoned properties by at least the amount of setback required in the adjoining residential zone. *Montgomery County Zoning Ordinance*, §59-C-5.33(b). The DOE property is zoned R-200. T. 200 (11/18/10). The

R-200 Zone requires a side yard setback of 12 feet and a rear yard setback of 30 feet. *Id.*, §59-C-1.323.

BV argues that the rear setback of the office building should be 30 feet from the DOE property, which is zoned R-200. T. 200-207 (11/18/10). In support of its contention that the rear setback should be 30-feet from the DOE property, BV testified (T. 200-201 (11/18/10)) that the Planning Board mandated the 30-foot setback and required the setback line to be shown on the preliminary plan (Exhibit 96), which it then incorporated into the record plat (Exhibit 90) with the following note:

2. All terms, conditions, agreements, limitations, and requirements associated with any preliminary plan, site plan, project plan or other plan allowing development of this property approved by the Montgomery County Planning Board are intended to survive and not be extinguished by recording this plat unless expressly contemplated by the plan as approved.

According to BV, the Planning Board required a 30-foot setback from the DOE property because if developed under that property's R-200 zoning, the subdivision would be designed so that the rear yards of the homes would be adjacent to MAPP's property, thus requiring a 30-foot setback. T. 200-201 (11/18/10).

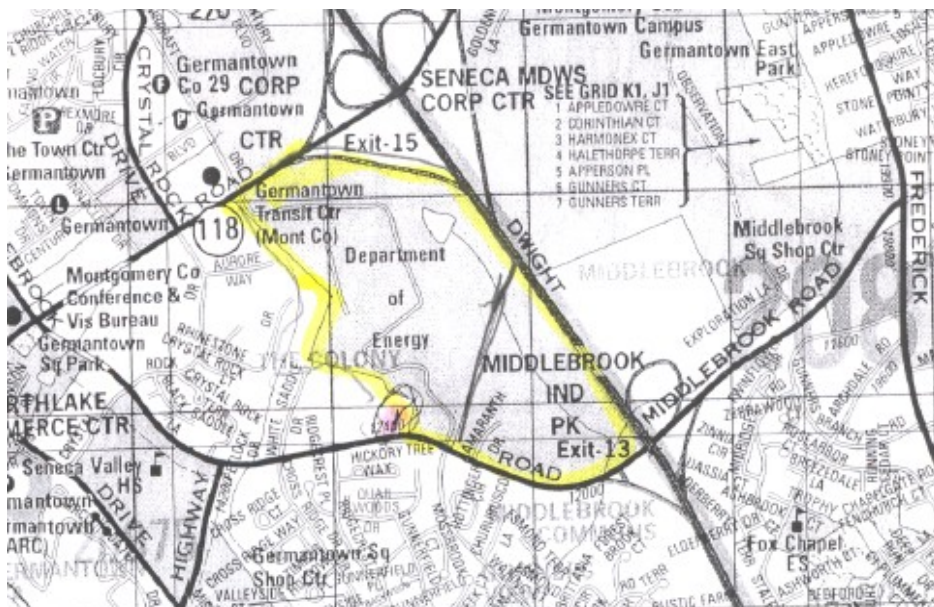
Mr. Niblock testified that he did not review the preliminary plan when approving the construction plans for the building permit. T. 154 (11/18/10). He had, however, forwarded the construction plans showing the 12-foot rear setback to Technical Staff, which approved the plans. T. 195 (11/18/10). In addition, Mr. Niblock testified that in his opinion, the adjacent lot, as developed by the DOE, constituted a "corner or through" lot under the Zoning Ordinance. T. 109-110 (11/18/10). This is because the lot has frontage on three sides, along Route 118, the ramp to I-270, and Middlebrook Road. As a corner or through lot, Mr. Niblock testified that the



yard adjacent to the office building property was a side yard, thus requiring 12 foot setback. T. 109-110 (11/18/10).

The Hearing Examiners conclude that BV has not proven, by a preponderance of the evidence, that a 30-foot setback from the DOE property is required. Other than the building restriction line shown on the preliminary plan, BV has presented no legal authority that the characterization of a lot under the Zoning Ordinance should be based on the property's potential development rather than its existing development under the I-1 Zone. The Hearing Examiners do not find the note on the preliminary plan persuasive, considering that the agency with primary expertise in the approval of subdivisions (*i.e.*, Maryland-National Capital Park and Planning Commission) did review the construction plans and made no objection. T. 194-198.

The Zoning Ordinance defines a “corner lot” as “lot abutting on 2 or more streets at their intersection, where the interior angle of the intersection does not exceed 135 degrees”. *Montgomery County Code*, §59-A-2.1. A “through lot” is defined as “[A]n interior lot, fronting on 2 parallel or approximately parallel streets.” *Id.* Mr. Niblock testified that he believed the DOE property more closely fit the definition of a corner rather than through lot. T. 190 (11/18/10).



A review of Exhibit 95(b) (on the preceding page), a roadmap showing the boundaries of the DOE property, supports Mr. Niblock's position that the property is a corner lot as defined in the Zoning Ordinance. Mr. Niblock testified that the DOE property has frontage on three sides, along Route 118, the ramp to I-270, and Middlebrook Road. Based on the weight of the evidence in this case, the Hearing Examiners agree that DPS properly applied the setback restrictions to the DOE property as it is currently developed.

## **2. Office Building Setback from Western Property Line**

Testimony from MAPP's engineer indicates that the main portion of the building is set back approximately 5 feet from the BV's property line on the western edge of MAPP's property. T. 47 (10/29/10). Section 59-C-5.33 of the Montgomery County Zoning Ordinance contains the required property line setbacks in the I-1 Zone:

(b) From any other lot line:

(1) If the lot adjoins a residential zone which is not:

- Recommended on a master plan for commercial or industrial zoning, or
- Used as a public parking lot

then the setback shall be not less than that required in the adjoining zone.

(2) In all other cases, no setback is required.

(3) *If a yard is provided, it shall not be less than 10 feet in width.*  
[emphasis supplied.]

The Zoning Ordinance defines a setback as, "[T]he minimum distance that a building or parking area must be set back from a lot line, according to the requirements at the relevant provisions of this chapter." *Montgomery County Zoning Ordinance*, §59-C-5.33. Mr. Niblock considered the awning as a solution to the setback on MAPP's western property line because DPS regularly interpreted setback requirements to run from the closest point of the building to the property line. T. 107 (11/18/10)

Mr. Niblock stated that it was his understanding from his former supervisor that the minimum side yard was required for maintenance between buildings. He also testified that a similar provision in the C-2 Zone requires only a 3-foot side yard. T. 103-104. Mr. Wilkoff testified that the minimum 10-foot side-yard is for both maintenance and emergency access. T. 251 (11/18/10). Neither side provided the written legislative history of this section, but there is no evidence that the side yard cannot be maintained.

Maryland courts have held that the primary purpose of statutory construction is to ascertain the legislature's intent, first by reviewing the language and giving the words their ordinary meaning. *Md. Overpak Corp. v. Mayor of Baltimore*, 395 Md. 16, 47 (Md. 2006) ("We start, as our well-established rules of statutory construction direct us, with the plain language of the statute where the 'ordinary, popular understanding of the English language dictates interpretation of its terminology.'") Moreover, some deference must be given to an administrative agency's interpretation (in this case, DPS's interpretation) of a statute it administers. *See, e.g., Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003).

Section 59-C-5.33 does not explicitly address situations in which portions of the building are different lengths from the property line. Therefore, DPS's interpretation meets the plain requirement of the statute, and the Hearing Examiners conclude that DPS's interpretation is not unreasonable under the facts of this case.

### **3. Required Parking**

Chapter 8 of the Montgomery County Code ("Housing and Building Maintenance Standards") provides, in mandatory terms, that new construction of buildings must meet the requirements of both the Zoning Ordinance and the building code. *Montgomery County Code*,

§§ 8-14, 8-26(g). It also makes clear that issuance of a building permit does not operate to override or invalidate a requirement of the Zoning Ordinance. *Id.*, Section 8-26(g); *see also*, *City of Bowie, supra*.

BV contends that the original building permit for construction of the entire building did not include the number of parking spaces required under the Zoning Ordinance and that MAPP proceeded at its own risk to continue to construct the office building while the permit was being appealed. Exhibits 153; T. 17-18(4/7/11). BV also argues that the layout and design of the existing parking spaces do not meet the Zoning Ordinance or the mandates of the federal American Disabilities Act. 42 U.S.C. 12181, *et. seq.*

MAPP counters that it can provide sufficient parking to permit the existing occupancies, including the 1,000-square foot pizza shop. Exhibit 152. It admits, however, that additional parking is required for the building to be fully occupied. Exhibit 152. The record of this case contains several revised parking plans attempting to address BV's issues regarding the amount of and design of the parking. None of the revisions to the parking plans for the office building demonstrate how parking will be provided for the entire office building using gross floor area.

The parties differ as to the number of parking spaces needed to support the current limited occupancy and the amount needed to for the building if fully occupied. Exhibits 152, 152(a). The disagreement arises because the parties utilize different methods of calculating parking under the Zoning Ordinance and due to some mathematical discrepancies in the parties' calculation. Exhibits 153(a), 152. BV claims that, for a new building, §59-E-3.7 provides that "the required parking is based on the **Total Gross Floor Area**, including common areas" (emphasis in original). Exhibit 153(a). BV further states that when an individual applies for an occupancy permit for a vacant space in an existing building, the actual gross floor area is

calculated based on the vacant space only...because the “common areas were already included in the original building parking calculations.” Exhibit 153(a). Based on its methodology, 53 parking spaces are required for the building as originally constructed (prior to the interior parking garage and pizza shop). Exhibit 153(a). As currently constructed (with the interior parking garage and pizza shop), BV states that 44 spaces are necessary. Exhibit 153(a).

Mr. Niblock testified that BV’s methodology is the methodology normally applied by DPS when reviewing a new building permit. When a new building plan comes in for his review, he looks at gross floor area (exterior wall to exterior wall) to determine the number of parking spaces required. T. 119 (3/4/11). When a tenant applies for an occupancy permit in the office building, he does not add back in the common areas or walls. T. 121 (3/4/11).

Mr. Niblock acknowledged that he did not calculate parking MAPP’s office building based on the gross floor area of the building because the building had already been constructed and now he is “trying to make lemons out of lemonade.” T. 120 (3/4/11). When issuing the occupancy permit for the building, DPS calculated parking based on the interior floor area. T. 120-121 (3/4/11).

MAPP posits four different parking scenarios. Scenario 1 states that the amount of spaces necessary “as per DPS criteria” for full occupancy equal 35 spaces. Exhibit 152. Scenario 2 states the number of spaces required “as per DPS criteria” for the building as presently occupied is 20 spaces. Exhibit 152, Attachment A-1. If based on gross floor area, MAPP asserts that 41 spaces are required for full occupancy and 24 spaces are required for the building as presently occupied. Exhibit 152, Attachment A-2. Finally, it states that 20 spaces are currently provided.

### a. Board of Appeals Authority

Section 8-23(a) of the *Montgomery County Code* mandates that on appeal, the Board may “affirm, modify, or reverse the order or decision of the Department.” The decision appealed in A-5787 is DPS’s issuance of the original building permit for the entire building. Because the Hearing Examiners conclude that DPS erred when it issued the building permit without sufficient parking on the Office Building Property and MAPP has not acquired a vested right in the construction, they recommend that the Board reverse DPS’s decision to issue the building permit and require MAPP to provide sufficient on-site parking based on the gross floor area of the building, with the exclusions permitted in the Zoning Ordinance.

### b. Zoning Ordinance Parking Requirements

A table in §59-E-3.2 of the Zoning Ordinance, shown above, sets forth the parking requirements for general office. The required number of spaces is displayed in a column labeled “Minimum Parking Requirements (Spaces/1000 GSF)”. The parties agree that the appropriate numerator for office use of the subject property should be 3 parking spaces. Exhibits 152, 152(a).

<b>Base Requirements for Office Parking</b>				
	<b>Minimum Parking Requirements (Spaces/1000 GSF)</b>			
<b>Proximity to Metro Station</b>	<b>Southern Area</b>	<b>South Central Area</b>	<b>Northern Central Area</b>	<b>Northern Area</b>
Less than 800'	1.9	2.3	2.6	N/A
800'-1600'	2.1	2.4	2.7	N/A
More than 1600'	2.4	2.7	2.9	3.0

The Zoning Ordinance defines “gross floor area” as measured from exterior walls and including certain common areas:

The sum of the gross horizontal areas of the several floors of all buildings on the lot, measured from the exterior faces of exterior walls and from the center line of walls separating 2 buildings. The term “gross floor area” shall include basements, elevator shafts and stairwells at each story, floor space used for mechanical equipment (with structural headroom of 6 feet, 6 inches or more) penthouses, attic space (whether or not a floor has actually been laid, providing structural headroom of 6 feet, 6 inches or more), interior balconies and mezzanines. The term “gross floor area” shall not include cellars, outside balconies which do not exceed a projection of 6 feet beyond the exterior walls of the building, parking or rooftop mechanical structures.

*Montgomery County Code*, §59-A-2.1.

### **c. Number of Spaces Required for Office Building**

The Zoning Ordinance clearly requires that the number of parking spaces for the entire building must be based on the gross floor area of the entire building. *Montgomery County Zoning Ordinance*, §59-E-3.2. Because the gross floor area is already calculated with the original building permit, calculating tenant occupancy based on net floor area is a reasonable interpretation of §59-E-3.2 and is consistent with both DPS’s traditional interpretation of the Zoning Ordinance and BV’s interpretation as applied to this case. T. 120-129 (3/4/11). While the parking formula Mr. Niblock applied to MAPP’s office building may have been a good faith attempt at a temporary solution while the appeals were pending, the Hearing Examiners have not been directed to any legal authority which would permit this situation on a permanent basis when the Zoning Ordinance clearly provides otherwise. The Hearing Examiners thus conclude that the Zoning Ordinance requires that parking for the office building, with the exception of tenant occupancies, should be calculated based on the gross floor area of the entire building.

MAPP has indicated that, if required, it can provide the required number of parking spaces on-site, either on the vacant portion of the first floor or in a parking garage. T. 51 (3/4/11). Because part of this parking may be within the building and because such internal

parking is excluded from the calculation of gross floor area, this Report cannot specify the exact number of spaces which must be provided on-site; however, the required number must be calculated by DPS based on gross floor area in accordance with the Zoning Ordinance, with credit given for any interior parking, and with spaces added to adjust for the net floor area of the pizza shop or other tenant occupancy if required. Both MAPP's plans and BV's architect's figures show the total gross floor area of the building at 17,445 square feet under the original construction drawings. Exhibits 152, 153. As MAPP has admitted that the gross floor area of the building is 17,445 square feet (Exhibit 152(a)), the calculation should begin with the requirement of 53 spaces (*i.e.*,  $3 \times 17.445 = 52.335$ ), less the credit for space devoted to internal parking and the addition of parking for the pizza shop or other allocable tenant occupancy.

The Hearing Examiners also recommend that the all parking be compliant with the requirements of the Maryland Accessibility Code, the ADAAG Guidelines and the Americans with Disabilities Act.<sup>10</sup>

#### **D. BA Case Nos. A-5832, and A-5886**

These cases are BV's appeals of DPS's decision to lift the stop work order, and not to reinstate the stop work order and revoke the building permit. As the Hearing Examiners have found that the issues raised in these cases are properly amendments to the original appeal of the building permit in BA Case No. A-5787, the Hearing Examiner recommends that these cases be dismissed as moot.

#### **E. BA Case No. A-5917 (BV Appeal of Use and Occupancy Certificate)**

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<sup>10</sup> While Mr. Niblock acknowledges that he is not an "expert" in the ADA, it should be noted that compliance with the ADA is not accomplished merely by providing the requisite number of handicapped parking spaces. A review of the 2004 ADAAG Guidelines and the 2010 DOJ *Standards for Accessible Design* indicate that valet parking must be accompanied by an "unloading area" meeting the requirements of Section\_209.4. As this Report recommends provision of additional parking rather than maintaining the existing parking, we need not reach the ADA issues, but the ADA requirements must ultimately be met.



Because the initial building permit was issued in error due to the lack of sufficient parking within the Office Building Area, the Hearing Examiners recommend that the use and occupancy permit appealed in BA Case No. A-5917 be revoked, and that DPS be directed, pursuant to Code Sections 8-23 and 8-28(e), to reissue a certificate of occupancy clearly marked “Temporary.” BV’s architect calculates that 30 spaces are required to support the existing occupancy of the building. Because MAPP indicates that it has the ability to construct the full amount of parking required on the site, the Hearing Examiners recommend that the temporary use and occupancy certificate explicitly limit occupancy to the existing amount of occupied floor area (4,666 square feet and the area of the pizza shop) until the full amount of required parking is provided on-site.

### **III. MODIFICATION OF SPECIAL EXCEPTION (S-2351-A )**

#### **A. The Subject Site and Surrounding Neighborhood**

MAPP requested several modifications to its 1998 special exception approval in order to address several as-built conditions constructed on the site which varied from its original special exception approval. Exhibit 52, p. 1. The Special Exception Area consists of 1.45 acres of Parcel E, east of the Office Building Area. Exhibit 52, p. 6. The property is located on the north side of Middlebrook Road, just west of its intersection with relocated Waring Road. Exhibit 52, p. 6.

The Special Exception Area has been developed as a gasoline station, including six pump islands with duel fueling positions, a canopy over the pump islands, a convenience store and a carwash. Exhibit 52, p. 6. There are two driveways providing access to and from Middlebrook Road. The northern driveway provides a shared access with the Office Building Area. Exhibit 52, p. 6. The existing improvements are shown on Exhibit 52, below:



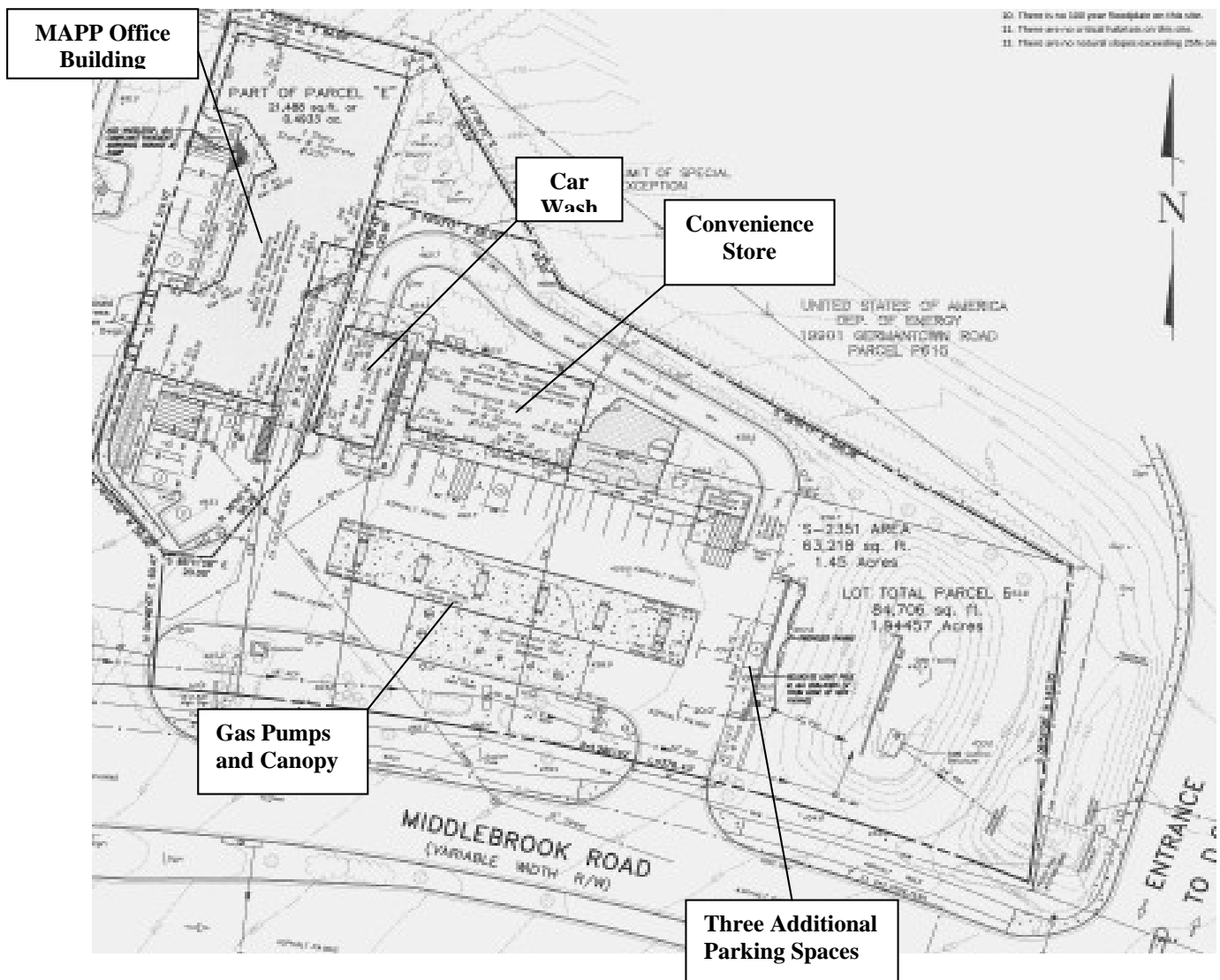
Technical Staff defined the surrounding neighborhood as the area bounded by Germantown Road to the north, Interstate 270 and Waring Station Road to the east, Stony Bottom Road and Cross Ridge Drive to the west/southwest, and Crystal Road Drive and Germantown Road to the west/northwest, shown on the Technical Staff Report (below) Exhibit 52, p. 7).



The parties have not disputed the delineation of the neighborhood recommended by Technical Staff. Having no evidence to the contrary, the Hearing Examiner agrees with Technical Staff that the boundaries described above constitute the surrounding neighborhood for the purpose of the special exception modification request.

### B. The Proposed Modifications

The site plan for the special exception was modified several times during the course of the public hearing. For the Board's reference, a copy of the final revised special exception site plan (Exhibit 130(e)) is set forth below:



Technical Staff advised that “the proposed modifications do not change the character of the underlying special exception and do not adversely affect the surrounding area.” Exhibit 52,

p. 13. Staff recommended approval with 6 conditions:

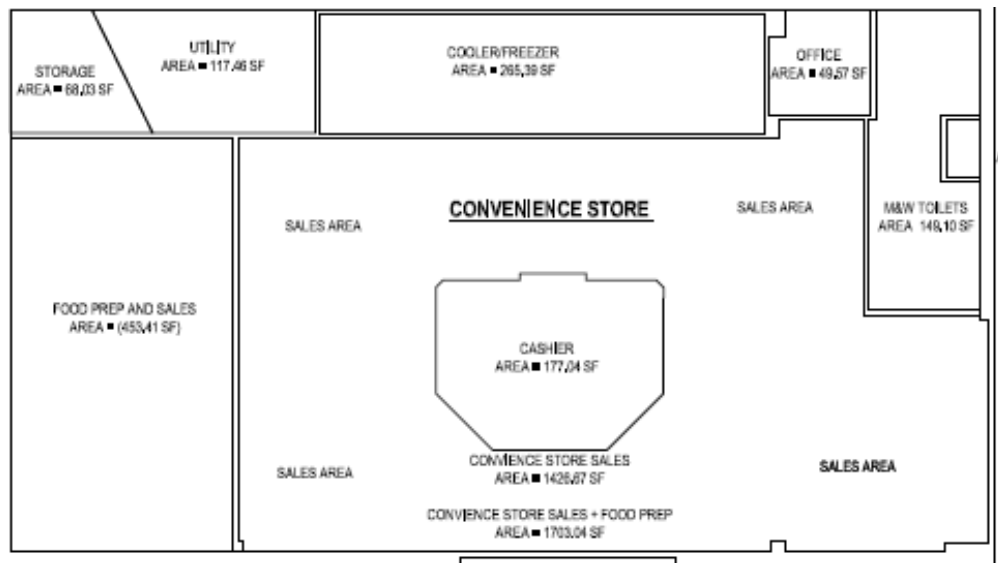
1. All terms and conditions of the previously approved special exception remain in full force and effect, except as modified by approval of this modification.
2. The gasoline station may remain open 24 hours per day, 7 days a week, and the convenience store will operate with the same hours, but only be open for public access to the interior between 6:00 a.m. and midnight. The carwash hours shall be 8:00 a.m. to 8:00 p.m. daily, 7 days a week.
3. The landscape plan must be revised to incorporate the following improvements to the landscape strip adjacent to the public right-of-way for review and comment by Planning Board staff and transmitted for approval by the Board of Appeals:
  - a. Install 2 new little Leaf Lindens, 2½ -3” caliper to much [sic] the existing tree species within the public right-of-way, where the horizontal spaces permit, approximately 45 feet on center to either side of the existing bike path.
  - b. Supplement the existing Juniper hedge with 2-foot-high, evergreen shrubs—install at 3’ or they should be able to grow to 3’.
  - c. Provide 2 additional 2½ -3’ caliper Zelkova shade trees, increasing the proposed 3 Zelkovas to 5 Zelkovas.
4. The gate for the dumpster enclosure must be repaired and painted with green to blend with the evergreen trees around it.
5. The height of the canopy over the pump islands must not exceed 17’ 10” on the west end and 21 feet and 8 inches on the east end as shown on the plan.
6. The canopy lighting must be modified by reducing the number of bulbs, installing deflectors, or reducing the wattage to achieve an average of less than 20 foot candles to ensure compatibility with adjacent uses and lower direct glare as seen from Middlebrook Road. All lamps must be recessed within the ceiling of the canopy. Exhibit 52.

The Planning Board, on July 9, 2009, recommended approval of the modifications with six conditions contained in the Technical Staff Report, and adding one conditions as follows:

7. No exterior or interior seating shall be provided for use by the patrons of the convenience store.

## 1. Parking for the Special Exception

This modification request would increase the number of parking spaces from the 15 spaces originally approved by the Board to a total of 18 spaces on the site of the special exception. Exhibit 130. The increase in the number of parking spaces is partially a result of modifications to the original floor plan for the convenience store. The revised floor plan for the convenience store (Exhibit 43(g)) is shown below:



A table from the revised site plan (Exhibit 130) shown below lists the difference in the convenience store uses approved by the 1998 special exception and the revisions to the store floor plan proposed:

Gas/Convenience Store Floor Area Breakdown	SE S-2351 Plan	Proposed
Total Building Footprint Area:	2830 sf.	2773.0 sf.
Total Floor Area:	2830 sf.	2539.18 sf. (*)
Sales Area & Food Prep (Includes Lounge):	1250 sf.	1708.04 sf.
Office Area (Inc. Closet):	53 sf.	59.12 sf.
Coolers:	307 sf.	265.39 sf.
Cashier:	100 sf.	177.04 sf.
Rest Room:	162 sf.	149.10 sf.
Utility Room:	330 sf.	117.46 sf.
Storage Area:	638 sf.	68.03 sf.
Total:		2539.18 sf.

With the exception of the area of the total building of the convenience store, the square footages shown above are measured from interior walls. Exhibit 130(a). At the public hearing, MAPP initially asserted that parking spaces were required only for the convenience store because parking for convenience stores has traditionally been calculated by measuring from the interior walls of each use. In support of its position, MAPP introduced several Board of Appeals opinions calculating parking for convenience stores in this manner. Exhibit 111.

BV argued that more spaces were required because the Zoning Ordinance requires parking for general retail be based on “gross leasable area” which is measured from the exterior walls. Exhibit 112.

For general retail uses, the Zoning Ordinance requires “5 parking spaces for each 1,000 gross leasable square feet. In accordance with the exception provision of Section 59-E-5.8 all storage space that exceeds 35 percent of the total gross leasable area shall be excluded in calculating the number of required parking spaces.” *Montgomery County Zoning Ordinance*, §59-E-3.7. BV submitted into evidence the standard definitions of “gross leaseable area,” and when interpreting an ordinance, the Hearing Examiner may look to common definitions of a particular term. Because the Hearing Examiners are required to apply the “plain language” of the ordinance, giving words their common meaning, the Hearing Examiner concludes that parking attributable to the convenience store should be based on gross leasable area, as explicitly stated in the Zoning Ordinance.

The quest to determine the required parking for the convenience store does not end simply with the gross leasable area of the building, however, because it supports two uses—the gasoline service station and the convenience store. In order to avoid duplication of parking requirements for two uses occupying the same building, a reasonable interpretation of the

parking requirement is to allocate the different areas of the building based on whether those areas primarily serve the convenience store or the gasoline service station. Both parties have agreed with this interpretation.

Mr. Horcasitas presented testimony as to what percentage of each area shown on the proposed floor plan was used by the convenience store and the gasoline service station. This allocation is shown on the revised special exception plan (Exhibit 130(e)) shown below.

Gas/Convenience Store Floor Area Breakdown	SE S-2351 Plan	Proposed	Attributed to Gas Station Use		Attributed to C-Store Use	
Total Building Footprint Area:	2830 sf.	2773.0 sf.				
Total Floor Area:	2830 sf.	2539.18 sf. (*)				
Sales Area & Food Prep (Includes Lounge):	1290 sf.	1703.04 sf.	80%	or	47.30 sf.	100% or 1703.04 sf.
Office Area (Inc Closet):	53 sf.	59.12 sf.				20% or 11.82 sf.
Coolers:	307 sf.	265.39 sf.				100% or 265.39 sf.
Cashier:	100 sf.	177.04 sf.	80%	or	141.63 sf.	20% or 35.41 sf.
Rest Room:	162 sf.	149.10 sf.	70%	or	104.37 sf.	30% or 44.73 sf.
Utility Room:	320 sf.	117.46 sf.	100%	or	117.46 sf.	
Storage Area:	638 sf.	68.03 sf.	80%	or	54.42 sf.	20% or 13.61 sf.
Total:		2539.18 sf.			465.18 sf.	2074 sf.
						Adjusted(+) 2248.22 sf.

\*2008 Tabulations for floor area were determined by the architect measuring the horizontal distance between faces of walls in individual rooms.  
 (+) A difference of 233.82 sf. between total building footprint and floor area due to inside measurements as stated above.  
 To account for this, 174.22 sf. (233.82/2773.00 \* 2074) is added to the C-store total.

Having no evidence to the contrary, the Hearing Examiners accept this allocation of square footage for the purpose of determining required parking for the convenience store. Based on the gross leasable area of the building, 12 parking spaces are necessary for the convenience store.

For the gasoline service station, the Zoning Ordinance requires one space for each employee and 2 spaces for each car wash bay. *Montgomery County Zoning Ordinance*, §59-#-3.7. Mr. Horcasitas testified that he employs three individuals to operate the gas station, convenience store, and car wash. Based on this testimony, the Hearing Examiner finds that a total of five additional parking spaces are required for the special exception uses, bringing the total number required for the special exception area to 17 parking spaces. The Applicant proposes to have 18 parking spaces, one more than required, as shown on the revised special

exception plan (Exhibit 130(a)). BV still argues the three new spaces added adjacent to the stormwater management facility should be restricted to employee parking so that customers are not required to cross the drive aisle. DPS states that such a condition would be unenforceable (or at the very least, difficult to enforce). The Hearing Examiners agree with both and therefore, recommend a condition requiring MAPP to include in its employee manual an instruction that employees park in the three spaces adjacent to the stormwater management pond, but do not go so far as to recommend a condition that expressly limits parking in those spaces to employees.

## **2. Canopy Height and Lighting**

The 1998 special exception site plan approved by the Board required that the canopy be no higher than 16 feet, 6 inches. Exhibit 29, S-2351; Exhibit 52, p. 6. The height of the canopy as constructed ranges between 17 feet, 10 inches to 21 feet, 8 inches from west to east. Exhibit 52, p. 6; T. 101-102. Mr. Neuberg testified that MAPP had interpreted its special exception approval to apply only to the western end of the canopy because the special exception site plan was not engineered. T. 105. Therefore, it did not take into account the difference in grade between the west and east ends of the canopy. T. 101-102. He also testified that the increase in height occurred because of a mistake during construction. His construction plans had shown a height of 16 feet, 6 inches, but it was interpreted as a minimum height. T. 106-107. Mr. Horcasitas testified that the canopy had been constructed higher than the 16-foot, 6 inch maximum both because of the grade and for operational reasons. T. 163. According to Mr. Horcasitas, additional height was necessary so that trash trucks could maneuver under the canopy even when their forks were raised. T. 162. He had not asked for permission to modify the canopy because he felt that the canopy's height would have little effect on the apartments across Middlebrook Road. T. 166-167. The cost of lowering the canopy would be approximately



\$70,000 to \$100,000. T. 167. A photograph of the existing canopy, contained in the Technical Staff Report (Exhibit 52, p. 11), is reproduced below:



In support of MAPP's request for an increase in the permitted height, Mr. Neuberg testified that the industry standard for canopy height is still 16 feet, 6 inches, but there are trucks that exceed the industry's standard height. T. 109. As indicated, Mr. Horcasitas testified that certain trucks, such as the trash trucks and semi-trucks, exceed the industry's standard height and therefore, the additional height is needed for operational purposes. T. 163.

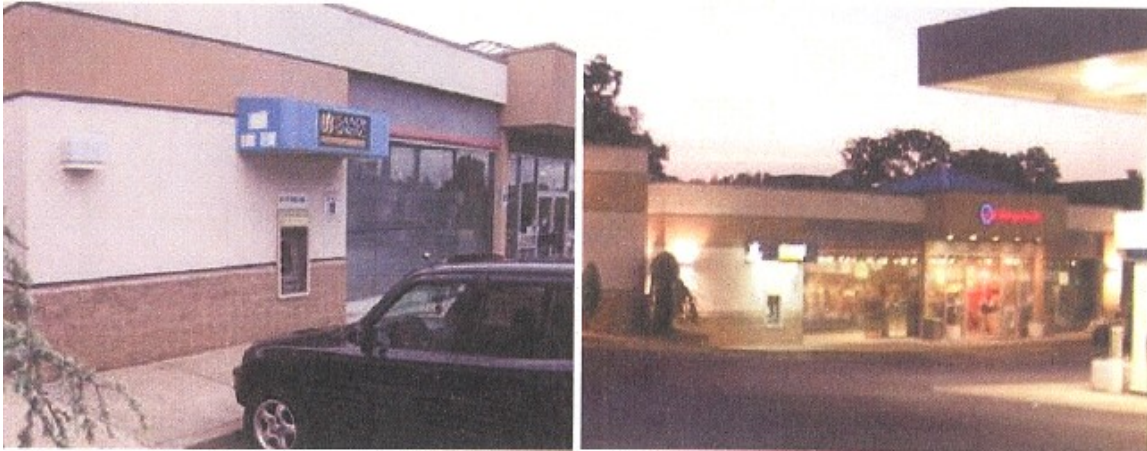
At the time Technical Staff issued its report, MAPP was proposing to modify its canopy lighting plan from the seven fixtures approved to 36 recessed fixtures utilizing lower wattage bulbs. Exhibit 52, p. 17. The photometric study accompanying the lighting plan showed footcandles above 0.1 past the property line only in the rear of the property, adjacent to the Department of Energy property, and at the driveway entrances. Exhibit 52, p. 17. Staff found, however, that the spillover was the result of outdoor pole lights that had been approved in the original special exception. Exhibit 52, p. 17. Technical Staff concluded that the new fixtures and lower wattage would focus light downwards with less spillover. Exhibit 52, p. 17.

Based on the revised lighting plan, Technical Staff recommended approval of both the increased canopy height and the revised lighting plan, with a condition requiring the Applicant to install deflectors or reduce the wattage to achieve an average of less than 20 foot candles in that area.. Exhibit 52, p. 17. Staff advised that the closest residences, located approximately 150 feet away across Middlebrook Road, were at least 25 feet higher than the average driveway elevation under the canopy. Technical Staff therefore found that the environmental impact of tearing down the existing canopy to lower the height by approximately 1 foot outweighed any impact on the closest neighbors. Exhibit 52, p. 17.

Before the Hearing Examiner and after Technical Staff's report, the Applicant again amended its special exception modification request to reflect new lighting that had already been installed by the applicant. This lighting consists of 50-watt LED lights installed flush into the canopy. T. 170. Mr. Horcasitas testified that these lights eliminated glare and contained light completely within the canopy. T. 170. At the Hearing Examiner's request, the Applicant submitted a revised lighting plan and photometric study for the current existing lighting to Staff for its review. Exhibit 93(a) through (d); Exhibit 99. Technical Staff did perform this review and supported the modification because the existing lighting addressed the Staff's earlier recommendation to reduce lighting to fewer than 20 footcandles under the canopy. Exhibit 126.

### **3. ATM Canopy**

MAPP's also requests approval of an existing ATM machine and canopy located to the left of the entrance to the convenience store, shown in the photographs on the next page. Exhibit 52; T. 92. The ATM has a lit canopy. T. 43.



Mr. Neuberg testified that the ATM would have no adverse effect on surrounding properties at that location. It was added as a convenience for customers of the station. T. 96-97. Staff advised, "...ATM machines have become typical accessories to modern gas stations and provide customers convenient access to their banks." Exhibit 52, p. 13.

#### **4. Landscape Plan**

The Applicant proposes to modify its landscape plan to incorporate existing landscaping and add additional landscaping in accordance with a recommended condition of approval included in the Technical Staff Report. Exhibits 52; 57. Technical Staff advises that the property is well landscaped and the proposed modification is aesthetically appealing and functional. Existing planting consists of shade trees, shrub, and ornamental trees along the street frontage, around the patio, and along the asphalt pave driveway to the carwash. Exhibit 52, p. 14. Staff recommended additional planting along the property's frontage to meet the minimum requirements in Section §59-E of the Zoning Ordinance and the 1994 Germantown Streetscape Concept Plan, and the Planning Board incorporated this condition into its recommendation of approval. Exhibits 52, p. 14 and 58. On July 20, 2009, MAPP submitted a revised Landscape Plan incorporating the changes recommended in the Technical Staff Report. Exhibit 57. Staff subsequently confirmed that the changes contained in the revised plan met the conditions in the

Technical Staff Report. Exhibit 59. The final revised plan (Exhibits 130(f), (g) and (h)) makes no changes to the landscaping shown on the plan; the only changes are the addition of the three new parking spaces.

### **5. Brick Patio and Fountain**

The Applicant also seeks approval for an existing concrete patio, fountain, and an existing door leading from the convenience store to the patio. Initially, there were tables and chairs on the patio. T. 178. Mr. Horcasitas testified that he installed the patio to make the gas station more attractive for customers and because he wanted an emergency exit from the convenience store. T. 160. BV presented evidence that the patio area had been used for sit-down seating for customers purchasing food and beverages in the store, that MAPP intended to operate a café in the special exception area, and that MAPP had converted a portion of the interior of the convenience store into a space where patrons could use the internet and watch television. The Notice of Violation issued by the Zoning Inspector required Mr. Horcasitas to remove the tables and chairs from the patio. Exhibit 5, A-5794. Mr. Horcasitas stated that he “virtually removed” them for a period of time by restricting them to employees. T. 180 (11/15/10). There is no indication that, at present, chairs or tables are on the patio.

Technical Staff recommended approval of the patio, fountain and exit door. Exhibit 52. The Planning Board imposed the following condition, not included in the Technical Staff Report:

7. No interior or exterior seating shall be provided for use by patrons of the convenience store. Exhibit 58.

### **6. Enlargement of Trash Enclosure**

Mr. Horcasitas testified that he enlarged the trash enclosure because Montgomery County instituted commercial recycling and he had to put a separate trash bin in the enclosure. T. 165.

BV opposed the enlargement because the opening for the expanded area was immediately in front of a parking space and operationally, it was not possible to maneuver one dumpster around the other. T. 205-206. In response, Mr. Crum testified that the parking space does not interfere with access to the enclosure because the dumpsters are moveable—they can be maneuvered in an east-west direction toward the trash truck. T. 129.

Technical Staff recommended approval of the enlarged area but recommended a condition providing, “The gate for the dumpster enclosure must be repaired and painted with green to blend with the evergreen trees around it.” Exhibit 52, p. 2.

## **7. Exterior Lighting**

MAPP testified that the Board of Appeals originally approved dual floodlight fixtures above the front of the carwash and at both front ends of the convenience store. T. 130, Ex. 7(b). Mr. Neuberg testified that these fixtures produce excessive glare, similar to a search light. T. 130. During construction, MAPP used different light fixtures for security and safety, installing cascade LSI 100-watt lights which would throw the light vertically and downward rather than horizontally. T. 132. These fixtures were placed on both the front and back of the building because the entrance to the carwash was located in the rear of the lot. T. 102-103. The existing lights produce no glare on the BV building, although those looking from the BV building would see the ground illuminated. T. 134. Nor would the lights produce glare on the property to the north owned by the Department of Energy. T. 134.

The Vision Division recommended removal of all the exterior wall mounted light fixtures that are not directed downward and requested a photometric plan revised showing the footcandles around the perimeter of the property. In response, the Applicant did submit another photometric plan (Exhibit 67). Technical Staff found that the lighting would “have no negative

impact on the street or the area and the overall photometric plan satisfies the requirements of the Code.” Exhibit 68.

### **C. The Master Plan**

Both Technical Staff and the Planning Board issued their recommendations on the proposed modification prior to adoption of the current *2009 Germantown Employment Area Sector Plan*. Exhibit 52, p. 7. Because the draft plan had not been adopted, they reviewed the proposed special exception modifications under the then-current *1989 Germantown Master Plan*. Exhibit 52, p. 7. Staff and the Planning Board recommended approval of the modification based on the 1989 master plan, with certain conditions imposed on the landscaping and lighting to ensure consistency with the plan.

The property is located in the Gateway District of the *2009 Germantown Employment Area Sector Plan*, adopted by the County Council in October, 2009, of which the Hearing Examiners take official notice. The 2009 Sector Plan states that it, “does not recommend any changes in land uses in the 382-acre Gateway District, where today there are commercial and industrial land uses.” *Sector Plan*, p. 56. More specifically, the Plan recommends retaining the commercial and industrial uses on the north side of Middlebrook Road, south of Great Seneca Highway. *Sector Plan*, p. 58. It proposes an “urban form” be created consisting of an urban line “through redevelopment” along the north side of Middlebrook Road, with service driveways in the rear of the properties. *Sector Plan*, p. 58. A recommended streetscape is included in the plan as well. *Sector Plan*, p. 35.

As indicated in Section II. B. of this Report, Technical Staff advised “that the proposed modifications do not change the character of the underlying special exception and do not adversely affect the surrounding area.” Exhibit 52, p. 13. The Hearing Examiners agree and

conclude that the modifications are too minor to be considered “redevelopment” under the Master Plan. Therefore, conformance with the “urban form” goals of the current plan is unnecessary. As to the streetscape guidelines, Technical Staff reviewed the revised landscape plan and found it acceptable. Because the 2009 Sector Plan recommends no changes in land use, the Hearing Examiners conclude that the proposed modifications are consistent with the 2009 Germantown Employment Area Sector Plan.

#### **D. Transportation**

Technical Staff determined that the proposed modifications would generate no additional vehicle trips and therefore are not subject to Local Area Transportation Review (“LATR”) or Policy Area Mobility Review (“PAMR”). Exhibit 52, p. 8. Assuming that the patio area is not used to provide seating for those consuming food on the premises, the Hearing Examiners agree and so find.

#### **E. Community Response**

Other than BV, there has been no input from the community either in support or opposition to the modification petition.

#### **F. Findings and Conclusions For The Special Exception**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have

satisfied all the requirements to obtain the special exception, if it complies with the recommended conditions (Exhibit 52).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiners conclude that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part IV. 7, below.

### **1. Standard for Evaluation**

When reviewing modifications to previously approved special exceptions, the Board of Appeals is limited to reviewing only the proposed modifications listed in the Notice of Public Hearing issued by the Board and those aspects of the use directly related to the modifications listed unless there is an increase of more than 25% or 7,500 square feet of the floor area of the buildings, whichever is less. *Montgomery County Zoning Ordinance*, Section 59.G-1.3(c)(4). As there is no increase in the total floor area of the existing building, the Board is limited to considering those aspects of the existing special exception directly related to the proposed changes.

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or



in conjunction with inherent effects, are a sufficient basis to deny a special exception.

For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Technical Staff concluded that those characteristics include the size, scale, scope, lighting, noise, traffic, and environmental of the special exception use. Exhibit 52, p. 13. Those characteristics that are consistent with the “necessarily associated” characteristics of automobile filling stations will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with the use, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff have identified the following characteristics necessarily associated with automobile filling stations:

1. Fuel pumps;
2. A structure providing storage and shelter for employees;
3. Traffic generated by customers, employees, and fuel deliver trucks;
4. Potential for queuing vehicles on site;
5. Noise associated with the use;
6. Signs advertising gas product and prices;
7. A significant amount of external lighting needed for safety;
8. Longer hours of operation than average business establishments;
9. Environmental impacts that may include fumes from idling vehicles and potential spillage of automobile fluids; and
10. Underground storage fuel tanks.

Exhibit 52, p. 13.

Technical Staff excluded a convenience store and car wash from those characteristics necessarily associated with an automobile filling station because those uses were not included in

the definition of “automobile filling station” set forth in the Zoning Ordinance.<sup>11</sup> The Hearing Examiners find it unnecessary to decide whether convenience stores and carwashes are inherent characteristics of automobile filling stations, because they agree with Technical Staff’s conclusion that these uses have become typical accessories to gasoline stations and no adverse impacts have been identified with the special exception modifications proposed, if the filling station is operated in accordance with its special exception approval.

Technical Staff found that the proposed landscaping is “aesthetically appealing and functional.” Exhibit 52, p. 7. Staff also concluded that the lighting plan adequately and efficiently covers the main vehicular access to the site, as well as the parking and driveway access to the carwash.” Exhibit 52, p. 14. The canopy lighting proposed meets Technical Staff’s recommendation that there be under 20 footcandles of light under the canopy. Exhibit 126. Therefore, the evidence demonstrates that the modifications to the lighting plan, the landscape plan, and the parking for the convenience store reduce the impact of the proposed use from what was either originally approved or subsequently installed. Considering size, scale, scope, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there would be no non-inherent adverse effects from the proposed use warranting denial of the modification petition.

## **2. General Conditions**

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

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<sup>11</sup> The Zoning Ordinance defines an “automobile filling station” as, “[a]ny area of land including buildings and other structures thereon, that is used to dispense motor vehicle fuels, oils and accessories at retail, where repair service is incidental and no storage or parking space is offered for rent. A car wash with up to 2 bays may be allowed as an accessory use to an automobile filling station.

**Sec. 59-G-1.21. General conditions.**

**§59-G-1.21(a)** -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: An automobile filling station is a permissible special exception in the I-1 Zone, pursuant to Code § 59-C-5.21.

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed modifications comply with the specific standards set forth in §59-G-2.06 for a automobile filling station, as outlined in Part F.3, below.

*(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is within in the area covered by the 2009 *Germantown Employment Area Sector Plan*. As set forth in Section III.C of this Report, the Hearing Examiners find that the modifications are consistent with the Sector Plan. While Technical Staff reviewed the modifications under the prior master plan, the current plan makes no changes to the land use recommendations in the prior plan. Further, Technical Staff did review the special

exception site plan after the Sector Plan had been adopted, and recommended approval. Exhibits 127, 129. The Hearing Examiners agree with Technical Staff that the proposed modifications do not substantively change the character of the area. For these reasons, the Hearing Examiners find that the use is consistent with the 2009 Germantown Employment Area Sector Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*<sup>12</sup>

Conclusion: Technical Staff found that, with the conditions it recommended, the proposed modifications did not alter the existing character of the neighborhood. Exhibit 52. The modifications increase parking on the site, thereby improving customer access to the facility, reduce the impact of lighting on the property, and supplement the existing landscaping. Traffic conditions will not be affected adversely, according to Transportation Planning Staff. Exhibit 52. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that the use would not be detrimental to the surrounding neighborhood because the nearest residential uses are “safely distanced” from the subject use and are located across Middlebrook Road and to the rear of the property is the DOE campus. Exhibit 52, p. 16-18. It concluded that the modifications proposed do not alter the findings made by the

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<sup>12</sup> This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

Board of Appeals in its original approval of the special exception. Exhibit 52, p. 18. The Hearing Examiners agree with Technical Staff and further find the modifications primarily reduce the adverse impacts on the surrounding community.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: With regard to the height of the canopy, Staff concluded that any nominal adverse impact on the neighborhood from the additional foot of height was outweighed by the environmental impact of removing the existing structure. Exhibit 52, p. 17. The Hearing Examiners agree with Technical Staff and find that the proposed modifications will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. The lighting proposed reduces the intensity of lighting on the property, and Technical Staff found the landscaping plan to be both aesthetically pleasing and functional. For these and other reasons set forth in answer to the previous section of this report, the special exception modification will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The Hearing Examiners find that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. While the floor plan of the convenience

store has been revised, additional parking has been provided based on the gross leaseable area of the building. This is not a new special exception, so it does not increase the number of similar uses in the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Because of its minimal impact, described in previous sections, the evidence supports the conclusion that the proposed modifications to the automobile filling station would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will continue to be adequately served by existing public services and facilities (Exhibit 52, p. 19), and the evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*<sup>13</sup>
- (i) does not require approval of a new preliminary plan of subdivision; and*
  - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available*

<sup>13</sup> This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

*public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception modification sought in this case would not require approval of a preliminary plan of subdivision and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed modifications. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. Technical Staff advises that the proposed modifications will not increase traffic generated by the special exception and therefore, do not require either Local Area Transportation Review or Policy Area Mobility Review. Staff also stated that, “as determined at the time of the initial special exception, S-2351, the subject use is served by adequate facilities. With the proposed modification the subject property will continue to be served by adequate facilities.” Exhibit 52, p. 19. Having no evidence to the contrary, the Hearing Examiners agree and find that these criteria have been met.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: As stated by Technical Staff, “there is no evidence that the proposed modification will reduce the safety of vehicular or pedestrian traffic.” Exhibit 52, p. 19. Based on the evidence of record, the Hearing Examiners find that the proposed modifications are not likely to negatively impact the safety of vehicular or pedestrian traffic, as the use will not generate a substantial increase in either form of traffic,.

### **Sec. 59-G-1.23. General Development Standards**

(a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the*

*special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: Technical Staff concluded that the proposal conforms to all applicable development standards of the zone. Exhibit 52, pp. 8-10. Having no evidence to the contrary, the Hearing Examiners agree with Technical Staff and so find.

*(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As set forth in Section III.B.1. of this Report, the Applicant proposes 18 parking spaces and 17 are required. Therefore, this standard has been met.

### **3. Special Standards**

#### **Section 59-G-2.06. Automobile Filling Stations.**

*(a) An automobile filling station may be permitted, upon a finding, in addition to findings required in division 59-G-1, that:*

*(1) The use will not constitute a nuisance because of noise, fumes, odors or physical activity in the location proposed.*

Conclusion: Technical Staff concluded that the modifications will not constitute a nuisance for the reasons set forth above. Exhibit 52, p. 20. The Hearing Examiners agree with Technical Staff because the proposed modifications do not emanate additional noise, fumes, or odors than what was previously approved, and additional parking is provided on the site.

*(2) The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads or intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic pattern from such buildings, or by reason of its location near a vehicular or pedestrian entrance or crossing to a public or private school, park, playground or hospital, or other public use or place of public assembly.*



Conclusion: Based on the plan it reviewed, Technical Staff found that the modifications do not impact the existing site circulation pattern. Exhibit 52, p. 20. The current modifications include three additional parking spaces adjacent to the stormwater management facility. Exhibit 130(e). BV has requested that these spaces be limited to employee parking to reduce trips across the driveway access and the convenience store. T. 76-85 (11/18/10). The County opposes this requested because such a limitation is too difficult to enforce. Technical Staff reviewed the parking plan and recommended approval. Exhibit 129. Based on Technical Staff's review, the Hearing Examiners find that on-site circulation as proposed is safe, as proposed.

(3) *The use at the proposed location will not adversely affect nor retard the logical development of the general neighborhood or of the industrial or commercial zone in which the station is proposed, considering service required, population, character, density and number of similar uses.*

Conclusion: Technical Staff determined that this requirement had been met because the modifications are not inconsistent with the mixed light industrial, residential and institutional character of the general neighborhood. Exhibit 52, p. 20. The Hearing Examiners agree with this conclusion and so find.

(b) *In addition, the following requirements must be complied with:*

(1) *When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened by a solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot planting strip on the outside of such wall or fence, planted in shrubs and evergreens. Location, maintenance, vehicle sight distance provisions and advertising pertaining to screening shall be as provided for in article 59-E. Screening shall not be required on street frontage.*

(2) *Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or to station driveways are prohibited.*

Conclusion: None of the modifications proposed affect screening of the property, except that additional landscaping will be added as shown in the landscape plan. Technical Staff found that none of the modifications include any product displays, parked vehicles or other obstructions which affect visibility at intersections or station driveways. Exhibit 52, p. 21. Based on this evidence, the Hearing Examiners conclude that this standard has been met.

(3) *Lighting is not to reflect or cause glare into any residential zone.*

Conclusion: Technical Staff has reviewed the modified lighting plan and concludes that it will yield fewer than 20 footcandles below the canopy as recommended in their staff report. Exhibit 126. The Applicant's photometric study shows that most of the site will have 0.1 footcandles at the property line. Exhibits 97(a), 99. Based on this evidence, the Hearing Examiners find that this standard has been met.

(4) *When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot as defined in section 59-A-2.1, and such driveways shall not exceed 30 feet in width; provided, that in areas where no master plan of highways has been adopted, the street line shall be considered to be at least 40 feet from the center line of any abutting street or highway.*

Conclusion: Technical Staff advises that the property does not occupy a corner lot and the driveways do not exceed 30 feet in width. Exhibit 52, p. 22. Having no evidence to the contrary, the Hearing Examiners find that this standard has been met.

(5) *Each gasoline pump or other service appliance must be located on the lot at least 10 feet behind the building line; and all service, storage, or similar activities in connection with the use must be conducted entirely within the*

*building. There must be at least 20 feet between driveways on each street, and each driveway must be perpendicular to the curb or street line.*

Conclusion: The Applicant does not propose any changes to the gasoline pumps. Technical Staff advises that the pumps are located at least 10 feet behind the building line; all service storage is located inside the convenience store; and the two access driveways are approximately 200 feet apart. Exhibit 52, p. 22. Based on this evidence, the Hearing Examiners conclude that this standard has been met.

*(6) Light automobile repair work may be done at an automobile filling station; provided, that no major repairs, spray paint operation or body or fender repair is permitted.*

Conclusion: The Applicant does not propose to do any repair work on the site, and therefore this requirement is not applicable to the proposed modifications.

*(7) Vehicles shall not be parked so as to overhang the public right-of-way.*

Conclusion: As previously set forth, there is adequate parking on the site to support the service station, convenience store and carwash. Therefore, this standard has been met.

*(8) In a C-1 zone, an automobile, light truck and light trailer rental, as defined in section 59-G-2.07, and in a C-2 zone, an automobile, truck and trailer rental lot, as defined in section 59-G-2.09, may be permitted as a part of the special exception, subject to the provisions set forth for such uses in this section. In addition, a car wash with up to 2 bays may be allowed as an accessory use as part of the special exception.*

Conclusion: Technical Staff reports that there currently is no rental activity on the property, and the proposed modifications do not include rental activity. The existing carwash has only one bay and no modifications to the carwash are proposed. Based on this evidence, the Hearing Examiners find that this standard has been met.

#### IV. RECOMMENDATION

Based on the foregoing analysis, the Hearing Examiners recommend that the Board take the following actions regarding Special Exception Modification Petition S-2351-A for the filling station located at 12301 Middlebrook Road, Germantown, Maryland and administrative appeals A-5787, A-5794, A-5832, A-5886 and A-5917, regarding the office building at 12311 Middlebrook Road, Germantown, Maryland :

1. Dismiss Case BA Case Nos. A-5794, A-5832, A-5886.
2. Grant BV's appeal in Case No. A-5787 because the number of parking spaces provided does not meet the requirements of Section 59-E-3.2 of the Montgomery County Zoning Ordinance, and impose the directives outlined below.
3. Deny that portion of BV's appeal in BA Case No. A-5787 related to setbacks for the office building.
4. Revoke the Certificate of Occupancy appealed in BA Case No. A-5914. Direct DPS to issue a temporary Certificate of Occupancy with the following set forth on the Certificate:
  - a. "This Certificate of Occupancy is temporary until such time that parking for the entire gross floor area of the building is provided in accordance with the Board of Appeals Decision and Order in BA Case No. A-5914 )."
  - b. Occupancy of the building shall be limited to 4,666 square feet of office use and 1,080 square feet of retail. No additional area may be occupied until such time as parking for the entire gross floor area of the building is provided in accordance with the Board of Appeals Decision and Order in BA Case No. A-5914 .
5. Revoke or suspend the building permit appealed in BA Case No. A-5787 until such time that MAPP provides 53 parking spaces, less those areas excluded from gross floor area by the Zoning Ordinance, and except for those areas currently used for retail. The amount of parking required for retail uses shall be calculated based on net floor area.
6. All parking for the office building shall comply with the requirements of the Americans with Disabilities Act, the 2004 ADAAG Guidelines, and, at a minimum, the requirements of the Department of Justice Standards for Accessible Design (the 2010 DOJ Standards or preceding regulations) which are applicable if and when the building permit is approved.

7. Grant MAPP's request for a major modification in S-2351-A, subject to the following conditions:
- a. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
  - b. All terms and conditions of the previously approved special exception remain in full force and effect, except as modified by approval of this modification.
  - c. The gasoline station may remain open 24 hours per day, 7 days a week, and the convenience store will operate with the same hours, but only be open for public access to the interior between 6:00 a.m. and midnight. The carwash hours shall be 8:00 a.m. to 8:00 p.m. daily, 7 days a week.
  - d. The gate for the dumpster enclosure must be repaired and painted with green to blend with the evergreen trees around it.
  - e. The height of the canopy over the pump islands must not exceed 17' 10" on the west end and 21 feet and 8 inches on the east end as shown on the site plan.
  - f. No exterior or interior seating shall be provided for use by the patrons of the convenience store.
  - g. MAPP shall include in its employee manual an instruction that all employees must park in the three parking spaces adjacent to the stormwater management facility.
  - h. The Petitioner must comply with the terms of its revised special exception site plan (Exhibit 130(e)), revised landscape plan (Exhibits 130(f), (g) and (h)) and lighting plan (Exhibit 93(a) through (d); Exhibit 99.
  - i. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: June 8, 2011

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner

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Lynn A. Robeson  
Hearing Examiner

## APPENDIX A

### **SUMMARY OF PUBLIC HEARING TESTIMONY S-2351-A, PETITION OF MID ATLANTIC PETROLEUM PROPERTIES, LLC**

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**I. OCTOBER 2, 2003 PUBLIC HEARING:**

Counsel for MAPP, BV, the Department of Permitting Services as well as the People's Counsel, appeared at the public hearing. Counsel for MAPP and BV presented opening statements on both the appeals and the special exception modification. After some discussion among counsel, all parties agreed to continue the case until the courts issued a decision whether the covenants relating to parking allowed MAPP to utilize parking spaces on BV's property. No evidence was presented. All parties agreed to the continuance on the condition that MAPP utilize only the amount of office space within the office building which could be supported by the parking on the non-special exception area, or 4,666 square feet. The Hearing Examiner requested the Department of Permitting Services issue a revised Certificate of Occupancy with this condition included.

**II. OCTOBER 5, 2009 PUBLIC HEARING:**

All counsel appeared at the public hearing. Counsel for BV requested a postponement as the parties had signed a letter of intent that could result in final settlement of all issues. Tr. 3. The hearing was postponed to April 12, 2009.

**III. OCTOBER 29, 2010 PUBLIC HEARING:**

**A. FOR THE PETITIONER**

**1. Carl E. Neuberg:**

Mr. Neuberg qualified as an expert in architecture. The MAPP property is shown on a subdivision plat which includes three parcels, Parcels C, D, and E. T. 71. MAPP owns Parcel E which comprises a total of 1.94 acres. T. 72. A note on the plat makes all parcels subject to the Parking Covenants. T. 71; Ex. 90.



**a. Modifications to Original Special Exception**

The special exception area consists of 1.45 acres of Parcel E. T. 74. That area is improved with a canopy and fueling stations, a convenience store, and a carwash. The balance of Parcel E is improved with an office building which is not subject to a special exception.

MAPP constructed the gas station in 1999. T. 74. The original special exception site plan depicted a dry cleaning establishment on the non-special exception area, although that was for illustrative purposes only. T. 74-75.

In January, 2003, MAPP received a Notice of Violation issued by Montgomery County. Ex. 12; T. 80. In response to the Notice, MAPP filed a major modification to its special exception site plan to permit certain as built conditions. T. 80. The major modification requested included changes to the originally approved parking, the addition of a stone patio with a water feature, increase in the height of the canopy, the addition of an ATM, and the canopy lighting. Ex. 4(b); T. 86, 101, 133.

Mr. Neuberg testified regarding the modifications to the original special exception proposed by MAPP.

**b. Parking:**

MAPP initially proposed to modify the special exception plan (in response to the Notice of Violation) by constructing a platform over the stormwater management pond to accommodate additional parking for the convenience store and the office building. T. 86-88. MAPP also proposed to add eight parallel parking spaces along Middlebrook Road to serve the office building. T. 88. MAPP modified one parking space in front of the convenience store to allow room for an additional dumpster. T. 88. At one point, MAPP proposed a sidewalk running from the stormwater management pond to the east side of the office building so that those spaces

could be used as additional parking for the office building in response to concerns raised about the safety of pedestrians crossing the special exception area. For that reason, BV objected to the modification. T. 88, 91. In 2009, MAPP revised its modification request to show all parking for the office building on the non-special exception area, either in surface parking or in parking areas on the first floor of the office building. T. 92.

On cross-examination, Mr. Crum testified that parking for the convenience store was calculated based on the square footage of the various interior uses and not on the gross floor area. T. 207-219.

**c. Addition of ATM:**

MAPP's modification request also proposes to include an existing ATM machine located to the left of the entrance to the convenience store. T. 92. The ATM has a lit canopy. T. 43. The revised 2009 special exception modification depicts the ATM in the correct location. T. 92; Ex. 43. Mr. Neuberg testified that the ATM would have no adverse effect on surrounding properties at that location. It was added as a convenience for customers of the station. T. 96-97.

**d. Addition of Brick Patio:**

MAPP also proposes modifying its original special exception by adding an existing landscaped brick patio immediately to the east of the convenience store. T. 97. The patio contains a fountain and is accessed through a side door from the store. T.99. The patio area had contained tables with umbrellas and chairs so patrons could sit and eat. Mr. Neuberg was aware that the parking requirements for sit-down eateries were much higher than those used for convenience stores. T. 99-100, 222. The patio still serves an aesthetic function and as an area where traveler's can stretch their legs. T. 100.

**e. Canopy Height:**

MAPP's special exception modification increases the height of the canopy over the fueling stations to reflect as-built conditions. T. 101; Ex. 43(h). The existing canopy height ranges from 17 feet, 10 inches at the west end to 21 feet, 8 inches at the east end due to the topography which slopes 4 feet downward from the west to east ends. T. 101-102. The Board of Appeals originally approved a height of 16 feet, 6 inches. T. 101-102. MAPP has always interpreted the height limitation to apply only to the west side of the canopy. T. 105. This is because the original special exception plan was not engineered, and therefore, did not take into account a slope of 4 feet downwards traversing west to east at the canopy location. T. 101-102. The petroleum industry uses a minimum height of 16 feet, 6 inches for canopies. T. 106-107. Therefore, MAPP interpreted the BOA's original approval as only fixing the 16-foot, 6-inch canopy height at its lowest elevation because that height was an industry minimum height. T. 105. Therefore, MAPP's modification includes only the height at the western most edge of the canopy. T.106-107. Mr. Neuberg testified that the increase in height occurred during construction—his construction plans used a height of 16 feet, 6 inches, but it was shown as a minimum. T. 106-107. During its 2003 special exception modification request, Technical Staff used canopy height standards promulgated by ASHTO, the American Society for Highway Transportation Officials. T. 107. Both at the time and currently, the petroleum industry standard is 16 feet, 6 inches as a minimum height. T. 107. Mr. Neuberg testified that the higher height limit at the present site is warranted due to topography and the fact that some trucks exceed the industry's height minimum. T. 109. A height of 17 feet, 10 inches at the lowest point will accommodate the majority of trucks safely. T. 110. The as-built canopy height has no adverse impact on BV's office building because the special exception area is downhill from BV's

building and is partially blocked from view by MAPP's office building. T. 111. Mr. Neuberg found it "extremely doubtful" that tenants in BV's building would notice any perceptual difference between the 16 feet, 6 inches height limit originally imposed by the Board and the 17-foot, 7 inch height limit actually constructed and part of the modification request. T. 111. Nor does the height increase affect the apartments directly across Middlebrook Road because there is 20 feet difference in elevations and some landscaping along Middlebrook Road. T. 117.

**f. Canopy Lighting:**

The Board of Appeals originally approved 24 drop down light fixtures under the canopy (dark squares shown on Ex. 43(h)). T. 113. The lights were covered with a glass bowl which threw light horizontally around the canopy rather than directly underneath. T. 113. The original lights were 320 watts. T. 105. In its modification request, MAPP proposed to reduce the wattage to 208 watts per light, recess the lights into the canopy, and add "focal" lights to reduce the amount of footcandles at the edge of the property.

During the hearing, MAPP modified its modification request to reflect as-installed conditions. T. 124-125. Mr. Neuberg testified that twenty-four 50-watt LED lights are currently installed on the underside of the canopy. T. 126; Ex. 93. The existing LED lights reduce the wattage from 4,500 (proposed in MAPP's modification application) to 1,050 watts. T. 123-127; Ex. 93(a)-(d). The photometric study of the existing light fixtures shows that there is an average of 17.29 footcandles under the canopy and the total wattage from 4,500 to 1,050 watts. T. 123, 127.

**g. Convenience Store/Carwash Exterior Lighting:**

The Board of Appeals originally approved dual floodlight fixtures above the front of the carwash and at both front ends of the convenience store. T. 130, Ex. 7(b). Mr. Neuberg testified

that these fixtures produce excessive glare, similar to a search light. T. 130. During construction, MAPP used different light fixtures for security and safety, installing cascade LSI 100-watt lights which would throw the light vertically and downward rather than horizontally. T. 132. These fixtures were placed on both the front and back of the building because the entrance to the carwash was located in the rear of the lot. T. 102-103. The existing lights produce no glare on the BV building, although those looking from the BV building would see the ground illuminated. T. 134. Nor would the lights produce glare on the property to the north owned by the Department of Energy. T. 134.

**h. Convenience Store Floorplan:**

Mr. Neuberg testified that MAPP proposes to modify its original floor plan as follows and as shown in Exhibit 43(g):

USE	APPROVED S.F.	PROPOSED S.F.
SALES AREA	1,250 s.f.	2,773 s.f.
OFFICE	53 s.f.	59.12 s.f.
COOLERS	307 s.f.	265.39 s.f.
CASHIER	100 s.f.	177.04 s.f.
TOILET	162 s.f.	149.10 s.f.
UTILITY AREA	320 s.f.	117.46 s.f.
STORAGE AREA	618 s.f.	68.03 s.f.
TOTAL	2,810 s.f.	2539.18 s.f.

As one enters the convenience store, the storage area is to the left and had at one point been used as a drycleaners, but currently is used for storage. T. 138-143.

**i. Modifications to Dumpster Area**

Mr. Neuberg testified on cross-examination that MAPP had had to expand the dumpster area to add a recycling container. The dumpster area extends beyond the trash pick-up and is in front of a parking space. He testified that there was access to the dumpster area even when a car was parked in front of the space because there is a double-door to the dumpster area which can

be opened halfway. T. 205-207. The trash bin enclosure is oversized and the recycling container is smaller than the regular trash container, therefore, the bins can be maneuvered in front of the parked car. T. 207.

**j. Administrative Appeals (Office Building)**

Mr. Neuberg testified that the 2-story office building contains 17,458 gross square feet. T. 146. It sits within the “non-special exception” area of Parcel E, which consists of 0.5 acres. The first floor contains 8,603 square feet and the second floor contains 8,851 square feet. MAPP occupies a portion of the second floor. T. 150.

**1. Parking and Loading**

The building was designed based on the assumption that parking would be available on BV’s property because of the Declaration. Some parking would be on-site, but the balance of the 35 required spaces would be off-site. T. 146-148.

At the time of the 2003 hearing before the Hearing Examiner, there were a total of 14 surface (exterior) parking spaces: 6 spaces on the south side along Middlebrook Road and 8 spaces on the west side of the building. MAPP agreed to comply with the Hearing Examiner’s directive at the 2003 hearing to limit office occupancy to 4,517 square feet—the amount that could be supported by the 14 then-existing spaces. T. 148-149.

Under the Zoning Ordinance, MAPP is required to provide 3 parking spaces per 1,000 gross square feet of general office use. After the 2003 public hearing, MAPP applied for and received a building permit for an additional 12 spaces inside the office building. T. 151. Subsequently, MAPP leased 1,080 square feet to a carry-out/delivery pizza store. The pizza store requires 5 spaces per 1,000 square feet (the formula for general retail); therefore, the 6 spaces in front of the building are used for the pizza store. T. 153. Current existing provided

parking includes the spaces in front of the pizza business, eight spaces on the west side of the building, and the 12 interior spaces for a total of 26 spaces. T. 153-154. The space devoted to interior parking is not included in the building's FAR for parking purposes. T. 156.

The height of the interior parking area is 10 feet, 9 inches and the garage door has a clearance of 9 feet, 4 inches. An average SUV or van is usually between 6 feet to 6 feet, 2 inches in height, so there is sufficient clearance in the interior parking area for most vehicles. T. 157.

MAPP proposes to meet its required parking (of 35 spaces) by reconfiguring and restriping the spaces in front (on the south side) of the building and by utilizing a "tandem" system in the interior parking area and a "lift" system in the surface parking on the west side of the building. T. 157 – 165.

Reconfiguring and restriping the parking spaces in the front will yield two additional spaces. T-158.

The tandem system requires parking one car behind another, necessitating a valet to operate the system. T. 157-158. In order to remove the blocked car, the attendant must move the outside car to another location and then maneuver the interior car to the garage access. T.

In addition to tandem parking within the garage, MAPP proposes to add lifts to the parking spaces in the rear. T. 161. Those spaces would then be able to accommodate two cars each, one above the other, for an additional 7 spaces. Operation of the lifts also requires a valet, who parks the first incoming car on the lift, raises the lift and parks the second car underneath. T. 161-163. The lifts are hydraulic; the valet pulls the car onto the lift, exits the vehicle and then elevates the car. T. 163. To reach the car on top, the attendant must move the vehicle underneath to a nearby location, lower the lift, and remove the upper vehicle. T. 163-164. The

attendant first parks cars in a non-lift area, then lower the lifts and parks cars on the lifts.. T. 165.

MAPP proposes to use the garage drive aisle to the interior parking as a loading area. T. 165. The Zoning Ordinance does not require a separate loading area if delivery is restricted to only UPS and FedEx truck deliveries.

## **2. Office Building Setbacks**

### **a. Western Property Line Setback:**

Mr. Neuberg testified that there is no required setback in the I-1 Zone. T. 168. If one is provided, however, the building must be setback at least 10 feet from the property line. T. 168. At the time MAPP received its building permit, MAPP's building was setback only 5 feet, one inch from the property line between BV's property and MAPP's property. T. 171. Mr. Neuberg testified that MAPP meets the setback requirements now because DPS issued a second building permit to construct an awning that extends from a portion of the western side of MAPP's building to the property line. T. 168. Mr. Neuberg stated that the awning is permanently affixed to the building and therefore meets the required setback. T. 168.

MAPP is also proposing to add two buttressed archways constructed of cultured stone on both the north and south sides of the building so people will still have access to the sidewalk between the upper and lower parking areas. T. 173.

### **b. Northern Property Line Setback**

Mr. Neuberg testified that if a commercial property adjoins the rear yard of a residential property in the I-1 Zone, the Zoning Ordinance requires a setback equal to the rear yard setback of the residential zone. T. 175. MAPP's northern property line abuts property zoned R-200, which is a residential zone, that is owned by the Department of Energy (DOE). T. 175. Under



the zoning ordinance definitions, Mr. Neuberg testified that the DOE property is either a through or a corner lot, and does not contain a rear yard. Therefore, no setback is required for the rear property line. T. 179. For the purposes of the Zoning Ordinance's definition of "through lot", the parallel streets forming the through lot are Middlebrook Road to the south and Md. 118 to the north of the DOE property. T. 179. Alternatively, the DOE property could also be considered a "corner" lot under the Zoning Ordinance, which does not have a rear yard as well. T. 180.

Mr. Neuberg testified that the 30-foot setback from the northern property line shown on the preliminary plan for MAPP's property is conceptual and the character of the lot, i.e., corner lot, through lot, etc., may be changed.. T. 186-188, 243. He also acknowledged that the site plan for the special exception showed a 30-foot setback in the non-special exception area. T. 188. The convenience store also had a 30-foot setback. T. 189. He also stated that in the original building permit plans for the office building, no setback was shown in the yard between MAPP's proposed building and BV's building, which was unusual. T. 196. He stated that no setback was shown on the record plat. T. 244.

The parking garage in the office building could accommodate two stacked cars because the ceiling height reached 12 feet—the lowest ceiling height was at the sprinkler heads which were approximately 10 feet, 9 inches. The "lift" spaces are not located underneath the sprinkler heads. T. 233.

The garage door is 10 feet wide. Mr. Neuberg did not know if the garage door had to meet a 20-foot width required in the Zoning Ordinance if MAPP used a valet parking system. T. 235. The parking plans had been reviewed by the County. T. 235. In order to comply with the fire safety code, special exhaust systems and emergency ingress/egress button for the garage

door must be installed. T. 237. MAPP is considering converting part of the unoccupied street level space on the first floor to interior parking to provide additional spaces. T. 238.

On redirect examination, Mr. Neuberg testified that the area labeled on the special exception floorplan as “Sales Area/Food Prep” will be closed off from customer use by a countertop. If the “food prep” area were deleted from the total amount of the area labeled “Sales Area/Food Prep”, the “sales area” would be reduced by 450 square feet and be almost the same size as that approved in the original special exception. T. 241. This is the largest difference between the old and new special exception floorplan. The “food prep” area is large because it includes a freezer/cooler, equipment, three-compartment sinks with wash-off boards, soup and sandwich dishes and the counter where the food is placed. T. 247-248.

**B. FOR THE OPPOSITION**

**1. Mr. Stephen Grayson:**

Mr. Grayson testified that he is a member of the limited liability company, Brookeville Joint Venture, LLC, which owns Parcel D and which adjoins the east side of MAPP’s property. T. 251. He testified that the property was sold to Mr. Horcasitas and his entity many years ago and during that transaction many hours were spent negotiating the special exception. Mr. Horcasitas alleged that Mr. Grayson had personally assured him that off-site parking was not going to be a problem and that it was permissible. BV contested the matter in Circuit Court, which disagreed with Mr. Horcasitas’ interpretation of the covenants, stating in its opinion that it did not find the statements of Mr. Horcasitas about Mr. Grayson’s representations to be credible. After the Court of Special Appeals affirmed the Circuit Court’s decision, there have been “continuous, repetitive modifications” to the special exception. T. 257-258.

Mr. Grayson stated that he believed that Mr. Horcasitas had operated over the years in “total disregard for the system” due to the number of items that had been installed or constructed on the site without special exception approval. T. 254-255. He believes that the changes proposed are not minor, but collectively are significant. T. 255. BV does not want the Hearing Examiner to “rubber stamp” the requested modifications, but refer them back to Park and Planning to evaluate the proposed modifications. T. 255-256. He stated that he did not rely on the truthfulness of the applicants and wants some method of enforcing the special exception, such as putting something in the chain of title. T. 256. He stated that the awning did not meet the setback requirements of the Zoning Ordinance because they consist only of metal pieces that have been fabricated to extend to the line in two locations and are no wider than the table from which he is testifying. T. 257. To resolve the setback violations, he believes that the Hearing Examiner should require MAPP to remove a portion of the building.

On cross-examination, Mr. Grayson testified that originally MAPP’s and BV’s property were part of the same parcel. T. 266. He stated that the Parking Declaration applied to the entire property including that ultimately conveyed to MAPP. T. 267, 270. Mr. Grayson testified that he is concerned that patrons of the convenience store will park on BV’s property. T. 271. He has seen individuals walk from BV’s property to the convenience store. T. 271. If it were tenants or employees from BV’s property, they would probably park up toward the building very close to where the parking is around the building perimeter. T. 271. He had put up signage designating each space on BV’s parking area is for tenant’s use only. T. 272. Visitors park wherever the tenant is allowed. T. 272. If the visitor doesn’t know he can park in the tenant’s spot, he possibly could use MAPP’s building. T. 272. He complained to the County about the tables and chairs placed in the patio area, but did not know whether it had been removed because

he hadn't visited the site. T. 274. He also could not say whether the internet computers and tables had been removed from the interior of the store. T. 275. He could not recall whether he testified before the Planning Board at the Board's public hearing on the special exception modification in 2009. T. 278.

#### **IV. NOVEMBER 15, 2010 PUBLIC HEARING:**

##### **A. FOR THE PETITION**

##### **1. Mr. Stephen Crum:**

Mr. Crum qualified as an expert in civil engineering. T. 121. His firm prepared the topographical survey and the boundary verification for Parcel E. T. 126. The special exception area does not include the portion of Parcel E where the office building is located. T. 124.

##### **a. Parking for the Special Exception**

With regard to the special exception, Mr. Crum testified that there were 15 spaces in front of the convenience store on October 28, 2010 when he visited the site, which is the number required by the Board of Appeals. T. 127. Immediately after the special exception was approved, the owner installed only 13 spaces which were larger than those required by the Code. T. 127. Now the spaces are clearly marked and correctly sized.

Mr. Crum testified that the Code calculation for retail parking is measured from the exterior walls, not the interior walls. On the special exception plan in the notations, the architect measured from the interior walls and therefore listed the floor area of the building to be 2,810 square feet. T. 139-142. He stated again that parking requirements were based on gross floor area, but "[W]hat is required is what is determined by the Board of Appeals." T. 140. He stated that the parking calculations employed by the Board of Appeals were based on the sales area

shown on the floor plan in the special exception case. T. 150-151. Therefore, approximately 800 square feet of the convenience store were removed from the parking calculations.

**b. Modification of Trash Enclosure**

MAPP also enlarged the trash pick-up area above what the Board of Appeals initially approved. T. 128-129. MAPP increased the size of the trash enclosure, located on the eastern side of the property near the access to the carwash. The enclosure is a small one, approximately 20 by 10 feet. There is a parking space directly in front of the enclosure. T. 129. The parking space does not interfere with access to the enclosure because the dumpsters are moveable—they can be maneuvered in an east-west direction toward the trash truck. T. 129. On cross-examination, Mr. Crum restated that the dumpsters were maneuverable. T. 143. There are gates in front of both dumpsters, one doesn't have to move one dumpster around the other. T. 144. Then one must open the gates and roll the dumpster southward, toward the parking space and then west toward the truck loading area. T. 144. He "believes" that there is sufficient room to pull the dumpster into the trash loading area. T. 144. He does not know size or weight of the dumpsters. T. 148.

The I-1 Zone requires that 10% of the property be green area. T. 129-130. Green space occupies 48.2% of the entire Parcel E. T. 130. When there are multiple buildings on 1 parcel, green space is calculated throughout the entire parcel. Even if, however, green space were divided among the parcels, each parcel would have substantially more than the required 10%. T. 130. The stormwater management pond was designed for all three parcels in the subdivision, including the subject property, BV's lot, and the lot to the west of BV's lot. T. 130.

**c. Landscaping**

Technical Staff concluded landscaping required by the special exception plan was missing from the large island between Middlebrook Road and the pump islands. T. 132. Staff

determined that additional shade trees should be installed to better screen the gas station canopy.

T. 133. Staff did not require removal of any vegetation. T. 134.

None of the modifications reflected a more intensive form or change in the nature of the use originally approved. T. 134. There was no increase in traffic, no adverse or inharmonious effects on the adjacent neighbors and no glare or noise. T. 134. The lighting actually installed under the canopy (and which is part of the modification request) would reduce the footcandles under the canopy and result in less intense, more effective lighting. T. 135.

**2. Mr. Carlos Horcasitas:**

Mr. Carlos Horcasitas testified that he is the managing member of Mid-Atlantic Petroleum Properties, LLC. T. 157. The company distributes petroleum and ethanol products throughout the Washington metro area and he owns stations in the District of Columbia, northern Virginia, Frederick County and Prince George's County. T. 157. The address of the gas station is 12301 Middlebrook Road, Germantown, MD. The address of the office building is 12311 Middlebrook Road, Germantown. T. 138.

**a. Parking for the Convenience Store**

Mr. Horcasitas testified that he initially installed only 13 spaces because he wanted larger spaces in front of the store for customer convenience. T. 158. After the County issued a Notice of Violation, he restriped the spaces several times. T. 158. He had to restripe the spaces multiple times because the person assigned to the painting did not use the correct paint. T. 158-159.

**b. Patio and Fountain Area**

Mr. Horcasitas testified that he installed the patio to make the gas station more attractive for customers and because he wanted an emergency exit from the convenience store. T. 160. He

removed the furniture after a complaint was filed, but wanted to retain the patio as part of the special exception request so that motorists had a place to use their cell phones. He felt that this was very important because it is now illegal to use them in the car. T. 161. He also installed the side exit door to the patio because an emergency exit was needed from the store. Aside from the entrance, there is one other door which is for deliveries. T. 174-175.

On cross-examination, Mr. Horcasitas testified that he had had tables and chairs within the patio area and these were included in a Notice of Violation issued by the County. T. 178. He did not immediately remove the tables and chairs because he “virtually removed” them by placing a sign in front of the patio area stating “Employees Only”. T. 180.

**c. Height of Canopy**

With regard to the requested canopy modification, Mr. Horcasitas testified that he knew the approved height was 16 feet, 6 inches. The canopy constructed was higher than approved because of the topography of the site and for operational reasons. T. 162. The topography sloped from the west to east side of the site and both sides had to balance. T. 162-163. They also needed enough height so that trash trucks could maneuver under the canopy even when their forks were raised and for semi-trailers. T. 163. He did not ask to modify his special exception at the time because of the site’s topography. T. 164. He felt that the height of the canopy had no impact on the apartments across Middlebrook Road because the apartments are 20-25 feet higher than the subject property. T. 166-167. Nor did he believe the canopy height had an adverse impact on BV’s property because that also was significantly higher than the special exception area. T. 166-167. The cost of lowering the canopy would be approximately \$70,000 to \$100,000. T. 167.



On cross-examination, Mr. Horcasitas testified that trash trucks still had to maneuver under the canopy even though there is a 30-foot wide drive aisle adjacent to the east side of the canopy to accommodate the trash trucks. He stated that the trucks had to approach the trash loading area from a straight angle, necessitating going underneath the canopy. T. T. 184-185.

**d. Trash Area Enclosure**

Mr. Horcasitas testified that he enlarged the trash enclosure because Montgomery County instituted commercial recycling and he had to put a separate trash bin in the enclosure. T. 165. He believed that, generally, these bins have wheels, but he wasn't sure whether the bins at the convenience store did. T. 165.

**e. Canopy Lighting**

Mr. Horcasitas installed new lighting underneath the canopy because the LED lighting reduced the wattage of each light from 335 watts to 50 watts. The lights were installed flush into the canopy and he stated that they eliminated glare completely. The lights don't spread—they stay within the canopy. T. 170. Nor did he install the flood lights approved by the Board because there was too much glare—they were a danger to people entering the site at night. T. 172.

**f. Convenience Store Floor Plan**

The revised floor plan does not change the size of the convenience store; rather, it only changes the amount devoted to particular uses on the interior. T. 173-174. He installed in an area on the west side of the interior when the store originally opened. T. 175. That area is now shown on the floor plan for storage. T. 176. In addition, the bathrooms were originally supposed to be installed within the area marked "storage". These were relocated and are the reconfiguration is shown in the proposed floor plan, Exhibit 43(g). T. 176. On cross-

examination, Mr. Horcasitas testified that there will be one additional employee due to the increased “food prep” area. T. 188.

He installed the computers as a convenience to customers. There is WiFi in the store. After BV complained, he removed the computers. T. 178. The computers will not be returned unless has received approval for them. T. 178. He stated that he changed the floor plan to the one proposed to provide a more customer friendly layout and more space for merchandise. He also wanted to preserve the original amount of food prep area that was approved in the original special exception. T. 174.

**g. Landscaping**

Mr. Horcasitas didn’t completely install the landscaping required by the special exception approval because he wanted a higher grade and more elaborate landscaping. T. 176. He is also requesting approval of the existing ATM located outside of the convenience store to the left of the entrance. T. 177. He installed the ATM outside to make it accessible to customers 24 hours per day. T. 172.

**B. FOR THE OPPOSITION**

**1. Mr. Robert Wilkoff:** Mr. Wilkoff qualified as an expert in architecture.

**a. Parking for the Convenience Store and Carwash**

Mr. Wilkoff stated that nothing in the zoning code allows one to segregate interior space within the convenience store for the purpose of calculating parking requirements. T. 200. Even if one used the interior wall measurement for the convenience store, 2,733 square feet, 13-14 parking spaces would be necessary for the convenience store. T. 200.

The Board of Appeals’ parking calculation was lower because they segregated out certain areas of the convenience store. T. 204. No provision of the Code permits this. T. 204. He stated that

all general retail uses are included within the parking calculations for that category in the zoning regulations.

He also testified that a convenience store use does not permit consumption of food on the premises. T. 201. The zoning code has different parking requirements for sit-down restaurants, which require 25 spaces per 1,000 gross square feet of floor area. The convenience store parking requirement does not factor in the delay for sit-down consumption. T. 201. When he visited the store in March 2010, he estimated the seating area to be approximately 160 square feet, which would add 4 spaces to the convenience store. T. 201.

As the station exists now, Mr. Wilkoff testified that the station requires 19 parking spaces under the Code. T. 202-203. This includes 14 spaces for the store (based on 2,733 square feet), 2 spaces for the carwash, and three for each employee. T. 202-203. If Mr. Horcasitas does add another employee, that would create the need for one more, or 20 parking spaces. T. 203-204. With only two employees, 18 spaces are required. T. 204.

He also testified that automatic carwashes he had designed previously necessitated at least one employee and approximately one-half the time necessitated two employees. T. 216-217. This is because the equipment doesn't work very well and employees are needed to perform services when the equipment isn't working. T. 216-218. The Zoning Ordinance definition of car wash does not differentiate between automatic and full-service car washes. T. 218. He does not think that the special exception qualifies for the "mixed-use" parking calculation under the zoning ordinance because that generally depends on having certain uses available at different times of the day, such as business open during the day and restaurants at night. T. 219.

**b. Trash Enclosure Area**

With regard to the dumpster area, Mr. Wilkoff testified that he'd never seen a dumpster that could be lifted manually and did not think it could work operationally. T. 204-205. If the two store employees were maneuvering the dumpster, then no one would be operating the store. T. 204-205.

**V. NOVEMBER 18, 2010 PUBLIC HEARING**

**A. FOR THE PETITION**

**1. Mr. Carlos Horcasitas:**

**a. Required Parking for the Convenience Store and Carwash**

Mr. Horcasitas testified regarding the special exception floor plan (Exhibit 113) for the convenience store. He stated that sales area and the food prep area are primarily related to the convenience store rather than the service station. T. 37. The office, including the closet is used for both. If one based the allocation of square feet on gross sales, sales of gasoline are roughly seven to eight times the sales from the convenience store. Therefore, he would allocate approximately 80% of the closet space to the service station. T. 38. The manager uses the office space to do accounting, and it's not otherwise used. T. 38. The walk-in coolers are devoted to the convenience store because they cool down beverages when delivered. T. 38. Mr. Horcasitas stated that he would allocate 80 percent of the cashier space to the service station. He would also allocate most of the bathroom area to the service station because most of their customers are primarily gasoline customers. T. 40. One hundred percent of the utility room should be allocated to the service station because the electronic equipment used to track gasoline inventories is located in that room. T. 40. In addition, the all of the electrical disconnects

relating to the pumps, canopy and outside pole lights are in that room. T. 41. He testified that 20% of the storage area should be allocated to the convenience store. T. 42-43.

The total floor area of the combined convenience store and service station is 2,539 square feet if measured from the interior walls. T. 43. The gross floor area (measured from the exterior walls) is 2,773 square feet, resulting in a difference of 234 square feet between net and gross floor area. T. 43-44.

Mr. Horcasitas also described the operation of the car wash. T. 48. It is designed to be fully automated and is an “in bay” car wash. T. 48. The driver enters the bay and parks the car at the position indicated by a machine. The machine then moves around the car to wash it. T. 48. This design is simpler than other car washes such as the one mentioned by Mr. Knopf at Rt. 355 and Battery Lane, which sometimes needs an attendant. At the Battery Lane car wash, there is a very tight turn into the car wash. At this station, people don’t have tight turns and may go directly into the machine. At the machine, there is an intercom. They may press the intercom button if they have questions, and an attendant will respond. T. 49.

This car wash design is much simpler than those that load cars onto a conveyor. At this car wash, most customers drive right in themselves and then follow the instructions from the machine. T. 49. He does not need additional employees to man the machine. When there is a maintenance issue, the company that services the machine sends a van which parks at the entrance or exit of the machine. T. 49.

He testified that he had not had problems with customers being unable to enter codes for the car wash at this location. The codes are sold to the customers at the pump and they just enter the code and follow the instructions. T. 50.

At another service station he operates in Darnestown, Mr. Horcasitas testified that he had operated a “hand wash” car wash using one of the service bays. T. 51. There, the attendant would meet the customer at the entrance and drive the car into the bay. After entering the bay, employees would then hand wash the car. He is replacing those interior bays with an automated car wash system at that location. T. 51. He rarely sees any car washes in Montgomery County using the old hand wash system. T. 52.

**2. Mr. Stephen Crum:**

**a. Parking for the Convenience Store and Carwash**

Mr. Crum testified that the 2,773 square-foot figure shown on the revised special exception plan (Exhibit 113) was the gross floor area of the building excluding the car wash. The 2,539 square foot figure reflected the architect’s calculations of the interior spaces inside the building.

The original approved special exception plan (from 1998) broke down the gas and convenience store floor area. It listed a sales area of 1,250 square feet, office of 53 square feet, coolers of 307 square feet, storage of 618 square feet, cashier space totaling 100 square feet, toilets of 162 square feet, and a utility room of 320 square feet for a total floor area of 2,810 square feet. T. 57.

The same space categories were used for the revised special exception plan, but different square footages were used. T. 58. The numbers used in the revised plans reflect measurement of the area all the way around the outside of the building to the inside, which includes the thickness of the walls. T. 58.

Mr. Crum submitted revised special exception plans (Exhibits 114(a) and 114(b)). T. 61. Both showed three additional parallel parking spaces adjacent to the eastern edge of the

pavement to the east of the eastern driveway entering the site. T. 61. The first alternative (Exhibit 114(a)) provides a 10-foot space at the fueling position, a 20-foot wide drive aisle. The spaces are seven feet in width by 21 feet in length because they are parallel spaces. Installing these additional spaces would require approximately 2.5 feet of additional pavement than exists today. T. 62. The paved area would be added to the east of the drive aisle. T. 62. This would require the garbage trucks to proceed under the canopy to reach the dumpster. T. 62.

The second alternative (Exhibit 114(b)) shows three spaces in the same general location, but moved totally out of the existing pavement area. These would require an additional 7 feet of pavement to the east of the driveway. T. 63. This alternative plan would keep the existing operational pavement width exactly the same as exists today. There would be a 20-foot drive aisle adjacent to the three parallel spaces and would leave 14.7 feet clear from the pump position. T. 63. The spaces could be constructed of a pervious surface to avoid any problems with the stormwater management facility. T. 63. Additional spaces could be placed over the back end of the landscaped area parallel to Middlebrook, but he felt that those would compromise access to the pump positions. T. 64. The proposed location does not conflict with stormwater management requirements or green space requirements. T. 64.

Mr. Crum testified that, if the gross floor area of the building were allocated between the convenience store and the gas station according to Mr. Horcasitas' testimony, 16.28 parking spaces (17 in order to round up) would be required. T. 69. Both alternative site plans provide a total of 18 parking spaces. T. 69. If necessary, there is a possibility of adding additional spaces by using angled spaces. T. 69. This would require a retaining wall to make sure the stormwater management facility could hold the same volume of storm water. T. 69-70.

**B. FOR THE DEPARTMENT OF PERMITTING SERVICES**

**1. Mr. David Niblock:**

**a. Parking for the Office Building and Stop Work Order**

Mr. Niblock testified that he is employed as a permitting services specialist for the Department of Permitting Services. T. 88, 92. He has been employed by DPS for 23 years, and has been a commercial plan reviewer for the last 10 years. T. 92. He reviewed the plans submitted with the building permit application for the office building. T. 92.

He testified that he did have some issues with the original plan, which subsequently were alleviated to his satisfaction. T. 93. Initially, he did not see an issue with parking on the property because he reviewed the site plan for the entire record lot, which indicated that 395 spaces were required and provided. T. 93-94. There appeared to be a cross-parking agreement in place. T. 94. Once BV registered its complaint, he contacted MAPP. T. 95. MAPP provided him with a copy of the private covenants, which he believed demonstrated that a cross-easement for parking existed. T. 95. When he subsequently received complaints from BV, BV submitted the exact same covenants MAPP had relied on for the parking easement. T. 96. In consultation with the County Attorney's office, he concluded that he was unable to determine which party was correct and referred the parties to the court system to resolve the issue. T. 96.

His supervisor, Ms. Susan Scala-Demby, initially issued a stop work order until the dispute could be resolved. T. 96. At the time the stop work order was issued, MAPP had done some clearing, grading and site work, but no footers had been installed.

DPS subsequently lifted the stop work order, as shown in a letter from Ms. Scala-Demby dated October 7, 2002. T. 101. DPS lifted the stop work order because the Board of Appeals granted MAPP's request to modify its special exception approval to put parking on the Special



Exception Area to support the office building. T. 101. He did not recall whether the stop work order was ever reinstated. T. 102.

Mr. Niblock also testified that he had been to the office building several times but did not recall the number of parking spaces on the exterior of the building. T. 110. He did not remember whether he or Ms. Scala-Demby were present at the 2003 hearing. He did inspect the building to verify that occupancy was limited to the 4,666 square feet requested by the Hearing Examiner. T. 111. At 3 spaces per thousand square feet, 14 parking spaces were required to occupy that amount of space. T. 112.

Mr. Niblock testified that MAPP did install an interior garage on the first floor of the building. T. 112. DPS issued a building permit for 12 interior parking spaces on October 7, 2004, resulting in a total of 26 parking spaces for the building. T. 113-115. At about the same time, MAPP applied for a certificate of occupancy for a pizza carry-out containing just over 1,000 square feet. T. 115. The Zoning Ordinance requires 5 spaces per thousand square feet for the pizza carryout, therefore, pizza shop required 6 additional parking spaces. With the additional interior spaces, there was sufficient parking for DPS to issue a certificate of occupancy for the pizza shop. T. 115.

Mr. Niblock also testified that even though the construction plans showed 12 interior parking spaces, he could only credit them with 8 spaces. When there is stacked parking, 50% of the spaces must have access to a drive aisle. T. 116. Referring to the plan (Exhibit 120), he would require removal of spaces 11 and 12, and he could then credit spaces 2, 3, 4, 6, 7, 9 and 10, or eight spaces. T. 117. Because of this requirement, the total of onsite parking spaces (both exterior and interior) equals 22 spaces. T. 118. Because the pizza shop needs 6 spaces,

that leaves a total of 16 parking spaces for the office building. The 16 spaces permit occupancy of 5,333 square feet of office space. T. 120.

When the stop work order was lifted, DPS restricted occupancy to 4,666 square feet. Mr. Niblock testified that DPS did have the ability to issue a conditional use and occupancy permit. T. 120. He has not been able to find a written document memorializing this condition, but he could re-issue an occupancy certificate with this condition on it. T. 120-121. He has never been presented with a plan for lift parking. T. 122. Mr. Niblock had seen industry demonstrations of lift parking, but he doesn't have any personal experience as to whether the amount of clearance in the interior garage would be sufficient. T. 122. The County has not yet adopted any regulatory standards for minimum head room in a parking garage. T. 123-124.

Mr. Niblock testified that the size, walking distance from the entrance to the establishment, arrangement and marking of the parking spaces complied with the requirements of Section 59-E of the Zoning Ordinance and that generally, the existing parking complied with the Zoning Ordinance. T. 125.

Upon questioning by the Hearing Examiner, Mr. Niblock stated that the 10-foot wide entrance to the parking garage met the Zoning Ordinance requirements as long as there is valet parking. T. 128. Valet parking requires only a one-way drive aisle because typically, there is only one person bringing the cars in and out. T. 128. If this were a public garage, either a 20-foot drive aisle or a second exit to accommodate two-way traffic would be required. T. 128. Section 59-E-2.4 of the Zoning Ordinance requires a valet to attend to the parking at all times, if attended parking is provided. In addition, 50% of the spaces must have direct access to interior drive aisles, entrance and exit driveways. T. 129-130. DPS' practice of requiring attendants to be on duty at all times has been in place at least for eight years that he has been employed by

DPS and was in place before that. T. 130. There is not very much attended parking in the County. T. 130.

On cross-examination, Mr. Niblock testified that he could not find a copy of the certificate of occupancy revised as requested by the Hearing Examiner at the 2003 public hearing. T. 134. He did not recall whether DPS had issued a use and occupancy certificate for the garage. T. 134. When presented with a copy, he testified that DPS had issued a use and occupancy permit for the garage dated December 20, 2005 (Exhibit 121). T. 137. Neither the building permit for the garage or the certificate of occupancy contained any limitation on square footage. T. 137. He stated that purchasers of the office building would not have notice that there were restrictions on amount of office space that could be occupied within the building. T. 137. He also did not know of a document showing that the garage is limited to 8 spaces. T. 138. The parking plan submitted with the building permit showed 12 rather than 8 spaces. T. 139. He stated that somewhere there should be a document showing that only 8 spaces were permitted under the building permit and use and occupancy permit for the garage, although he has been unable to find it. T. 144-145. None of the plans submitted with the building permit for the parking would show the height of the garage—he would have to go back to the original building plan for that information. T. 145. The site plan for all parcels within the record lot shows only totals of parking spaces provided and not the amount required for each use. T. 147-148.

Mr. Niblock stated that when he reviewed the plans for the parking garage, he did check to see if they had sufficient handicapped spaces under the American's with Disabilities Act (ADA). T. 180. The requirement is that these spaces be located in the closest available entrance to the building. T. 180. He did not believe that a separate ADA space was necessary in the garage because the garage and the exterior parking are all one parking facility. T. 180. He was

not privy to why DPS' let construction proceed knowing there was a dispute over the available parking. T. 183. He further testified that the permit for the awning was never appealed, nor was the building permit or use and occupancy permit for the garage parking. T. 183.

**b. Setbacks for the Office Building**

**1. Setback on Western Property Line**

With regard to the office building's setbacks, Mr. Niblock testified that the Zoning Ordinance permits a zero-foot setback to a side property line. T. 103. If, however, there is a setback, the setback must be a minimum of 10 feet. T. 103. As had been explained to him, the minimum 10-foot setback was required for maintenance. If there was only a one-foot gap between the buildings, trash, rodents, etc. could accumulate without being maintained. T. 103. In order to provide light, ventilation, and access between the buildings, the 10-foot required setback was established. T. 103. He could not explain why the setback is 10 feet in the I-1 Zone and 3 feet in the C-2 Zone. T. 104.

Mr. Niblock admitted that he erred when he issued the building permit because the office building was setback only 4 feet from the property line rather than the 0 or 10-feet permitted or required. T. 104. He notified MAPP of the error and determined that it could be resolved by construction of an awning to the lot line on the north side of the building. T. 105. MAPP obtained a building permit for the awning in June, 2003. T. 105. He determined that the awning cured the setback violation because setbacks are measured to the closest point of the building. Therefore, as long as any portion of the building extends to the property line, it meets the setback requirements. T. 107. He could not explain how the awning addressed the maintenance concern that was the purpose of the 10-foot setback. T. 108.

Mr. Niblock stated that the side yard on the western side of the Office Building Area had to be zero or 10-feet under the I-1 Zone. T. 155. The side yard provided (under the awning) is approximately 4 feet. He testified that the normal interpretation of his department is that setback's are measured from the closest part of the building to the lot line. T. 157. He stated that the four-feet not under the awning constituted a side yard under the zoning code. T. 159-160. Even though that side yard does exist, the ordinance counts any portion of the building as meeting the setback requirements. T. 160. The Zoning Ordinance does not mandate that any set percentage meet the required setback. T. 160. He testified that, with the awning, there is no side yard. T. 160.

Mr. Niblock further testified that, potentially, an adjoining property owner could build right up to the side property line, thus leaving only a four foot space between the building. T. 164. Mr. Niblock did not believe that was inconsistent with his prior testimony regarding space for maintenance. T. 165. T. 159-160. Even though that side yard does exist, the ordinance counts any portion of the building as meeting the setback requirements. T. 160. The Zoning Ordinance does not mandate that any set percentage meet the required setback. T. 160. He testified that, with the awning, there is no side yard. T. 160.

He stated that moving the building to the common property line was not consistent with the parking covenants. T. 185. DPS' typically approves building permits based on cross-easements between owners. T. 185. The parking requirements for general office use exclude any interior floor area that is used for parking, so that does not count toward gross floor area for the purpose of calculating the required number of spaces. T. 186.

The canopy which extends to the western property line is a permanent structure and considered part of the building. T. 186-187. In his opinion, the DOE property constituted a

through lot under the Zoning Ordinance. T. 189. A through lot has two front property lines and two side property lines, but there is no rear property line. T. 190.

## **2. Rear Setback on the Office Building**

With regard to the rear setback, Mr. Niblock testified that the U.S. Department of Energy (DOE) occupies the R-200 property to the rear of the Office Building Area. T. 109. Under the Zoning Ordinance, that property could be considered a corner lot or a through lot. It has frontage on three sides, along Route 118, the ramp to I-270, and Middlebrook Road. As a corner or through lot, Mr. Niblock testified that the yard adjacent to the office building property was a side yard. The I-1 Zone requires a 12-foot setback from a residential zone and the office building met this requirement. T. 109-110.

On cross-examination Mr. Niblock testified that he had not reviewed the preliminary plan or record plat prior to deciding that DOE's property was a corner lot. T. 154. Even if the preliminary plan had showed a setback, Mr. Niblock testified that that wouldn't have affected his opinion that the DOE property was a corner lot. T. 155.

He further testified that the line shown 30 feet from the northern property line on the preliminary plan was simply to show a "make believe" building, but was not a building setback line. T. 192-193. He did not know why the line was shown on the preliminary plan because he does not review preliminary plans. T. 193. If the setbacks were shown on the preliminary plan or record plat, he would not enforce it because he only interprets the Zoning Ordinance and not the subdivision regulations. T. 194. He did submit the building permit plans for the office buildings to Park and Planning Staff for their review. T. 195. Technical Staff did not raise any objections to the office building construction plans. T. 195. When determining that the DOE

property was a through lot, he did not look at potential subdivision under the base R-200 zoning for the property. T. 198.

**C. FOR THE OPPOSITION**

**1. Mr. Robert Gould:**

**a. Office Building Setbacks**

Mr. Gould testified that he is the manager of Brooke Venture, LLC, and was personally involved in the approval of the preliminary plan for the entire lot. T. 200. He testified that when the preliminary plan was submitted to the Planning Board, they did not take the position adopted by Mr. Niblock with regard to the DOE property. T. 200. Park and Planning treated the property as it ultimately might be subdivided under the R-200 zoning. They determined that the most likely layout of a subdivision on the DOE property would have rear lots adjoining the property subject to the preliminary plan. T. 200-201. The Planning Board insisted that the 30-foot setback be included on the preliminary plan. T. 201. He testified that MAPP included a 30-foot setback for the convenience store and the car wash. T. 204.

He believes that Brooke Venture could build up to the property line under the covenants, thus potentially leaving a four-foot yard between MAPP's office building and BV's property. T. 202. The covenants don't require that access to the different parking areas be at a particular location; rather they only require that access be provided. T. 203.

**b. Parking Covenants**

BV placed the parking covenant on the property in order to receive subdivision approval. T. 206. When the property was developed, there was a moratorium on subdividing properties. There was one exemption for lots which had not changed their boundary lines for 40-50 years. T. 206-207. Therefore, you could apply for a building permit without a record plat. T. 207.

Because BV couldn't subdivide, it divided the property into tax account parcels by metes and bounds descriptions so that purchasers could finance independent areas of the property. The lender then placed a lien on an individual parcel, but not the entire area covered by the record plat. T. 207. This allowed BV to develop the lots one parcel at a time and developed a second building. T. 206-207.

At the time it was recorded, there was only limited access to and from the entire record lot to Middlebrook Road. T. 207. BV created the covenants to allow passage from one property to the other and to have non-exclusive parking. T. 208. The covenants stated, however, that any parcel owner had the right to declare the parking spaces on its parcel exclusive to their use, so there was a conditional joint parking arrangement. T. 207-208. The court agreed with this interpretation. T. 208.

After the moratorium was lifted and the first building was sold, the property owners decided that it would be best to subdivide the parcels into separate recorded lots. Mr. Horcasitas' property was the third lot sold. BV co-existed with MAPP until construction of the office building. BV opposed the office building because it meant that MAPP would be using BV's parking. T. 209. He does not understand why DPS let Horcasitas proceed to construct the building with the parking issue unresolved. T. 209.

On cross-examination, Mr. Gould testified that while the record plat did not show a setback line, it incorporated the setback line shown on the preliminary plan. T. 210. There is a note on the plat stating that all terms, conditions, agreements, limitations or requirements associated with the preliminary plan survives recording of the plat. T. 210-211. Two of the buildings shown on the preliminary plan ended up being constructed at the locations shown. T.



213. He also stated that the DOE property had never been developed as a residential subdivision. T. 217.

**2. Mr. Robert Wilkoff:**

Mr. Wilkoff testified a second time, this time regarding the parking and setbacks for the office building. He stated that BV's office building is set back at least 30 feet from the DOE property.

**a. Office Building Parking**

Mr. Wilkoff testified that he disagreed with Mr. Niblock's testimony that there were 8 parking spaces which meet Code requirements on the west side of the building. T. 220. The problem with the 8 spaces on the upper level is that there is no ADA access to the second floor of the building. T. 222. The Americans with Disabilities Act requires an ADA compliant parking space at the closest access to an entry level. In addition, the only way to get from the lower parking spaces into the building would require going down the drive aisle to the garage and up through the elevators. T. 222. He stated that this constitutes a violation of the ADA because it is not the shortest distance to an entry level, and a person in a wheelchair may not share a drive aisle. T. 222. Anyone using a wheelchair may not use the sidewalk along the driveway entrance to the parking garage because it is blocked at one point by a gas meter with steel bollards to protect it from vehicular traffic. T. 223. The bollards reduce the width of the sidewalk below 32 inches, the width required to accommodate a wheelchair. T. 223.

The upper parking lot does not meet the ADA because the ADA spaces must be on the shortest distance to an entrance when there are multiple entrances to a building. The garage entry doesn't satisfy the ADA because a wheelchair is not able to use the walkway and, under the

ADA, may not share the drive aisle with vehicles. T. 225. Nor does the existing parking have ADA-compliant parking. T. 225.

To comply with the ADA, the upper or western parking area, some existing parking spaces should be converted to ADA spaces. T. 226. Mr. Wilkoff testified that the parking garage would have to have an ADA parking space in the garage because there cannot be dissimilar amenities in a building. T. 226. They should have one ADA space on the west side (upper level) exterior parking level and one inside the garage. T. 227.

On the lower exterior parking level, MAPP's proposes to add parking space by creating a small peninsula at the end which separates three parking spaces and the driveway to the garage. T. 227. MAPP shows it as a striped space, but it's required to be curbed and landscaped under Section 59-E-2.43 of the Zoning Ordinance. Six spaces currently exist on the site and MAPP is now proposing two additional spaces in the lower level of the exterior parking. One of the ADA spaces is shown at an angle, so that one parking space blocks the other. T. 228. The parking space that's currently shown at the southern end of the building in the lower level of exterior parking does not have access to the building and therefore is not a legal space. T. 228. He did not believe that the existing six spaces meet the requirements, because there is only one accessible parking space shown. Neither of the proposed two parking spaces shown on the exterior lower level meet ADA requirements because there is no legal path of travel for persons with disabilities to gain access to the building. T. 231.

Mr. Wilkoff stated that his opinion that two ADA spaces are required on-site is based on MAPP's proposal to have more than 25 spaces, and not on the existing 14 spaces. T. 235. He also stated that the ADA requires MAPP to include an ADA space in the garage so that persons

with disabilities have access to all amenities provided. T. 235. He considers the parking garage a weatherproof amenity. T. 235.

The parking in the garage also violates the ADA because it requires an accessible passenger loading zone if valet parking is provided. There is no place on the site that may accommodate the required loading zone. T. 236. According to Mr. Wilkoff, when valet services are intermittent, the ADA requires that the accessible space be located in the garage.

Finally, for valet parking access, the drive aisle in the parking garage must be at least 20 feet wide unless its angled in which case it may be reduced to 18 feet. T. 237. On this site, Mr. Wilkoff stated that it's "virtually impossible" to make those widths because of the number of columns. T. 237. This is because the garage space was not originally designed as a parking garage. The Zoning Ordinance requires that the 18-foot width has to be in place on one side of a central column, which would eliminate four of the parking spaces shown. T. 237-238.

Mr. Wilkoff stated that the garage layout was unworkable in his opinion because there is insufficient space on the exterior to park the number of cars the valet would have to move to access certain spaces. T. 240. There is no space for the valet to stack multiple cars without the required 18- or 20-foot drive aisle. T. 241. In his opinion, there are only 6, possibly 7 workable spaces. T. 241.

Mr. Wilkoff testified that a "drive aisle" is different from the "driveway" access to the garage. T. 241. The drive aisle is an aisle with parking on either side; a driveway does provides access to the garage but does not have parking on either side. T. 242. Including the possible maximum of 7 spaces in the garage, Mr. Wilkoff testified that there would be 22 total spaces on the exterior and interior of the building. T. 243. If 6 spaces are required for the pizza shop, this leaves 15 for the office building. Fifteen spaces would permit MAPP to occupy 5,000 square

feet of the office building. T. 245. Mr. Wilkoff stated that lift parking would exacerbate the existing parking problems. T. 246.

Mr. Wilkoff also testified that he did not agree with Mr. Niblock that the awning resolved the violation of the building setback on the northern property line. He stated that the purpose of requiring a minimum side yard width was to provide a clear yard, not just for maintenance, but also for fire department access. T. 251. He did not know the fire rating of the wall on MAPP's property, but a different rating may have been required if the full 10-foot side yard was not required. T. 251. While DPS' interpretation that setback's should be measured from the closest point to the property line, it doesn't make sense for this purpose because it has nothing to do with the original intent behind requiring a clear side yard. T. 251.

**B. FOR THE DEPARTMENT OF PERMITTING SERVICES**

**1. Mr. David Niblock**

**a. ADA Compliance**

Mr. Niblock testified that the County Building Code required only ADA parking space for up to 25 parking spaces. T. 233.

**VI. MARCH 4, 2011, PUBLIC HEARING**

**A. FOR THE PETITION**

**1. Mr. Carl Neuberg**

**a. Revised Office Building Site Plans**

Mr. Neuberg testified that he had prepared modified floor plans and parking plans for the office building, which were submitted as Exhibit 130(e). T. 33. The plans were based on Mr. Wilkoff's testimony at the prior hearing. T. 33.

On the west side of the building, there were originally 8 parking spaces. Mr. Neuberg eliminated one of those spaces and provided an access aisle with a ramp for a handicapped space directly into the building leading to the elevator. T. 34. On the south side of the building facing Middlebrook Road, they have included one handicapped space in a cluster of 8 parking spaces. T. 35. There is no obstacle to get to the sidewalk. T. 35. Access to the building is provided through doors that lead to an unrented space, which is unfinished shell space. T. 35. The corridor is undefined, but the door into the elevator lobby is marked so people can see it. T. 35. The unrented space is similar to any unused space in a shell building. It has been his experience that the building code does not require a finished corridor through shell space to an outside entrance. He stated that the building code is met if the route is clear, unobstructed, and signage is provided so there is a visible route for someone to take. T. 36. Inside the unfinished shell space, there is emergency lighting. T. 57. Were the power to go out, there are backup batteries that over the exits. T. 58.

Mr. Neuberg stated that there is a driveway and sidewalk on the east side of the building so that a person getting out could go along the sidewalk on the south side and then go along the east side of the building. There is a transition area along the driveway to the garage where the bullards for the gas meters protrude into the sidewalk, so that one could come back in through exterior doors to the elevator lobby. T. 37. They propose asphalt conditioning along the sidewalk in that area to improve access to the rear and middle entrance to the building and elevator corridor from the east side. T. 37. He has also shown a designated drop-off area inside the garage, and there is an access lane coming into the corridor to the elevator to the second floor. T. 38.

On the interior garage, the revised plan reduces the number of interior parking spaces from 12 spaces to nine spaces. Five of those spaces have direct access to the ingress and egress lane of the garage, meeting the requirement that over 50% of the spaces have direct access to the drive aisle. T. 38-39, 42. Mr. Neuberg testified that MAPP no longer wishes to utilize lift parking in the garage. T. 39.

Mr. Neuberg testified that Mr. Niblock had reviewed the revised site plans. One ADA space is required for the entire building because it is considered one parking facility. T. 41. Therefore, the revised parking plans show more than is required by the ADA. None of the spaces shown on the plans block any other spaces or vehicles maneuvering into or out of those spaces. T. 42. Operationally, an individual parking in the handicapped space inside the garage may gain access to the second floor by crossing the area striped as the unloading zoning to the elevator. T. 43.

The revised plan includes 24 parking spaces, including the ADA spaces. T. 43. A total of 20 spaces are required for the area occupied inside the building, resulting in a surplus of 4 spaces. This would permit an additional 1,304 square feet of office space. T. 43.

Mr. Neuberg also testified that the parking shown on the revised plans would allow vehicles to maneuver on the inside without having to drive down the driveway. T. 44. There is still some maneuverability in the garage with all 9 spaces occupied. If that isn't available, the valet could back out of the driveway, park in front of the building in the area near the pizza shop or along the landscaped area on the special exception site. T. 45. There is no need to park cars along Middlebrook Road. T. 45. Mr. Neuberg understood that Mr. Niblock approved the revised plans when presented to him. T. 46.

The side of the office building adjoining Brooke Venture's property is set back approximately 5 feet, one inch from the property line. This is sufficient space to permit access for maintenance and emergency services. T. 47.

Mr. Neuberg also testified regarding the changes to the special exception site plan that had been submitted. He stated that the only change was the addition of three parking spaces along the driveway adjacent to the stormwater management pond. T. 64.

On cross-examination, Mr. Neuberg testified that that if only one ADA space is provided for the office building, located in the upper level parking area, persons with disabilities would access the pizza shop by entering the second floor of the building, taking the elevator to the first floor, and proceeding through the unrented space. They could also exit the door on the east side of the building to the sidewalk in the front or west side of the building. This would require a wheelchair to leave the sidewalk where the gas meters are located and enter the driveway to the parking garage. T. 68-70.

He also testified that there could be scenarios, where the garage was not completely full, under which the valet would not be able to maneuver the cars within the garage. T. 76. There are occasions, although not all the time, the cars could maneuver in the garage. T. 76. There are also possible open spots on the exterior which could be used by valets to temporarily move vehicles. T. 77. One possible location is along the landscaped island between Middlebrook Road and the pump islands at the service station. T. 77. He estimated that that location would be approximately 120 feet from the garage. T. 77. He stated that it may not be the optimal solution because of the time it might take the valets to move cars, but it could be done. T. 78.

He stated that it was his understanding that in calculating parking, the Zoning Ordinance required that only the net floor area be used. T. 80. Based on the net floor area of the space, he

calculated that 35 parking spaces would be necessary to fully park the space. T. 80. He acknowledged that the Zoning Ordinance uses the terminology “gross square feet”, but he did not calculate the required parking on that basis. T. 81. There are exemptions for certain spaces, like cellars or basements. T. 83. He also stated that the revised plans showing 24 parking spaces assume that the unrented space will remain unoccupied. T. 85. Based on 24 parking spaces, MAPP has an additional 1,334 square feet which may be rented. T. 86.

With regard to the northern property line, Mr. Neuberg testified that MAPP’s office building was approximately 20 feet from BV’s building. T. 90. With regard to the eastern property line, Mr. Neuberg stated that he has no evidence that the property will be redeveloped with single-family homes under the R-200 Zone or how that future subdivision would be designed. T. 91.

He also testified that there is a concrete curb on the walkway in front of the pizza shop. T. 129. There is no slope because the top of the curb aligns with the sidewalk and asphalt. T. 129. As one turns the corner and goes down the driveway on the east side, it becomes a six-inch curb for a while, and then tapers to zero at the gas pumps. T. 130. At the southeast corner of the building, the walkway is essentially smooth so one doesn’t need to step up to the curb. T. 133.

**B. FOR THE OPPOSITION**

**1. Mr. Robert Wilkoff (Cross-examination).**

**a. Special Exception**

On cross-examination, Mr. Wilkoff testified that the special exception plan (Exhibit 130) revised after the last hearing reflected three new spaces and met BV’s concerns. T. 12.

**b. Office Building Parking**



Mr. Wilkoff testified that the revised site plan for the office building showed 7 rather than 8 spaces in the upper level parking on the west side of the building. An ADA space had been added to that side along with pavement markings and a ramp. T. 13. He stated that the parking on the upper level now met his concerns expressed at the last hearing. T. 13.

He testified the revised site plan also showed two ADA spaces in front of the pizza shop. T. 15. That area had accessibility to the unrented space on the first floor of the building, which connected to the hall and the elevator. T. 16. He stated that the unrented space could be improved with a dedicated corridor if necessary. T. 17. He stated that if the dedicated hallway were shown on the plan, he believed it would be compliant with the ADA. He believed that a dedicated hallway was necessary because if the area was rented, a handicapped individual could not proceed through a separate leased space. T. 18-19. If the area marked “hallway” were extended to the doorway and also had an entrance to the potential leased space, that would be compliant. He stated that the hallway had to be constructed *before* the unrented lease is rented because, if it is the only handicapped entrance to the first floor, the access must be dedicated. T. 19. In his opinion, using lines to mark the walkway was not sufficient to “dedicate” the hallway. T. 19-20. The hallway would have to be closed off to be dedicated, which would mean the area would count toward the parking requirements. T. 20.

Mr. Wilkoff testified that the garage will require its own ADA parking space because it is an “amenity” for which persons with disabilities must have access. T. 22. With valet parking, the ADA does not require a handicapped parking space in the garage. The ADA requires that the handicapped person have access to the valet parking—there may be a dedicated unloading area outside the garage. T. 22-23. The valet system shown in the site plan requires the driver of the vehicle to take the car into the garage. The handicapped individual is dropped off in the

unloading area shown inside the garage, and the valet parks the car. T. 23. According to Mr. Wilkoff, having the handicapped individual drive the car into the garage is completely inconsistent with the concept behind having the 10-foot width for the drive aisle. The basis for the 10-foot width is that the valet will be parking the vehicle; under this scenario, the handicapped individual is driving the vehicle into the garage. T. 23. Having the valet drive with the individual into the garage is inconsistent with ADAAG 4.6. That section provides that there has to be a drop-off area outside of spot the valet picks up the car. T. 25. He stated that requiring a handicapped individual, possibly in a wheelchair, to exit the car at an exterior unloading spot, circle around the vehicle, and get in the passenger side is unworkable. T. 25. In his opinion, this would be exacerbated by locating the drop-off spot right at the entrance to the drive aisle. T. 25. ADAAG requires a drop-off area that does not require crossing a parking lot or driveway to reach an accessible entrance. T. 26-27.

Mr. Wilkoff further testified that the square footage on which MAPP based its parking requirements were from interior wall to interior wall and did not include any common areas. T. 94-95. Common areas included bathrooms, the elevator, and the entrance vestibule. T. 95. The definition of gross floor area in Section 59-E of the Zoning Ordinance includes those areas. T. 95. He performed a rough calculation of the parking areas (but mistakenly excluded a utility area) and estimated that the space currently leased requires an additional 4 spaces. T. 96. He found there was approximately a 1,000 square foot difference between the area excluding the common areas and the exterior wall and the gross floor area of the building. T. 96.

Nor did Mr. Wilkoff agree with MAPP's position that the ADA required only one ADA parking space for the entire building. T. 98. Section 103 of the Americans with Disabilities Act deals with "equivalent facilitation." T. 98. That requires that persons with disabilities have

equal access to all amenities in a public property. T. 99. He testified that equal access is required for the garage. T. 99. The loading drop-off zone shown on the plan does not meet the detail or spirit of the ADAAG. T. 99.

Mr. Wilkoff testified that the curb-cut ramp on the southern parking area does not meet the ADA Code. T. 105. In addition, there must be an enclosed corridor in the unrented space to qualify as an accessible entrance because the ADA does not deal just with wheelchairs. Someone who was blind would not be able to locate the entrance door at the other end of the unrented space. T. 106.

The one-way driveway access to the garage does not meet the ADA because of the two bollards which protect the meters. T. 106-107. The asphalt area does not cure that problem. ADA access cannot be in the same direction of the driveway—it must go perpendicular to the driveway. T. 107. The curb peninsula created at the end of the south parking lot that separates parking space number 1 from the one-way driveway into the garage does not meet the building code because it is shown as a flush curb. T. 107. Finally, the garage layout is just not workable because there is no staging area to temporarily park the cars while retrieving cars from the interior spot. T. 108.

On cross-examination, Mr. Wilkoff stated that he assumed that MAPP could control and hours its employees entered and exited the parking garage to avoid multiple cars being moved at one time. T. 109. He also stated that the area in front of the pizza shop could be workable. T. 110.

He also testified that parking for commercial space is calculated by gross floor area rather than interior floor area. T. 112. Space used for parking is not counted toward calculating the parking requirements because it's not habitable space. T. 112.

### **C. FOR THE DEPARTMENT OF PERMITTING SERVICES**

#### **1. Mr. David Niblock.**

Mr. Niblock testified that he met with Mr. Neuberg after the last hearing in November, 2010. T. 118. He reviewed the revised layout in Exhibits 130(i), 130(j), and 130(k). He agreed that the revised layout met the parking requirements as far as number of spaces and their location. T. 118. He stated that the revised layout meets the parking requirements in the Zoning Ordinance. T. 119.

When a new building plan comes in for his review, he looks at gross floor area (exterior wall to exterior wall) to determine the number of parking spaces required. T. 119. He stated that now we “trying to makes lemons out of lemonade” T. 120. In 2003, the parties agreed that based on the existing parking, they could occupy approximately 4,600 square feet. T. 120. They looked at the interior floor area that was actually occupied and measured that area. T. 120. He could not remember whether that was based on the interior walls or not. T. 120. When there is a different occupant or new tenant of the building, he does not calculate back in the common areas and interior walls. T. 121. During his review of the initial construction plan, he would have required parking based on gross floor area, minus the exclusions in the Zoning Ordinance. T. 122. For tenant occupancy permits, he excludes those items when determining whether there is sufficient parking in the building for the tenant. T. 122.

From his point of view, the handicapped requirements posited by Mr. Wilkoff go well beyond what is required. Based on his calculations, the building needs to have only one handicapped space. T. 122-123. In his opinion, MAPP has gone well beyond what is required by providing three. T. 123. He believes that the two spaces on the exterior building are workable and the space inside the garage is unnecessary. T. 123.

Mr. Niblock testified that if additional parking were required inside the building, a new certificate of occupancy would be required to account for the different square footage. T. 123. The new certificate could be conditioned on occupancy of only a portion of the building. T. 124.

With regard to the interior spaces, Mr. Niblock testified that the 9 spaces shown on Exhibit 130 meet the requirement that at least 50% of the spaces have access to a drive aisle. T. 124-125. He acknowledged that he had been unable to find a copy of the occupancy certificate that was to contain the limitation on square footage occupied requested by the Hearing Examiner in 2003. T. 126. As a rule, occupancy certificates for parking garages do not list the number of spaces approved. T. 126. He also stated that he has never reviewed the ADA regulations regarding equal access to different amenities. T. 126. He does not classify himself as an ADA expert. T. 127.

**APPENDIX B**  
**CHRONOLOGY OF THE CASE**

**List of Appeals**

- S-2351A: MODIFICATION OF SPECIAL EXCEPTION
- A-5787: STEPHEN GRAYSON'S (BV'S) APPEAL OF BUILDING PERMIT
- A-5794: HORCASITAS' (MAPP'S) APPEAL OF STOP WORK ORDER
- A-5832 BV'S APPEAL OF DPS' DECISION TO LIFT STOP WORK ORDER
- A-5886: BV'S APPEAL OF DPS' DECISION NOT TO ISSUE STOP WORK ORDER AND NOT TO REVOKE BUILDING PERMIT
- A-5917: BV'S APPEAL OF USE AND OCCUPANCY PERMIT

<b>DATE</b>	<b>ACTION TAKEN</b>	<b>EX. NO.<sup>14</sup></b>
11/2/98	BOA issues decision approving special exception for gas station, convenience store and carwash	29 (S-2351)
4/2/02	BV letter to MAPP asserting that MAPP had not provided sufficient parking for the Office Building on the Office Building Property; also asserting the covenants did not permit parking for the building off-site.	9(j) (A-5832)
5/22/02	DPS issues building permit for Office Building	118
6/5/02	DPS issues Notice of Violation for Office Building due to failure to provide sufficient parking	7 (A-5794)
6/10/02	Letter from Susan Scala-Demby, Permitting Services Manager, refusing to lift Stop Work Order due to lack of evidence that parking requirements may be met.	117
6/14/02	BV letter to MAPP asserting that all parking for the Office Building had to be on-site.	17 (A-5787)
6/14/02	Grayson (BV) Appeal of Building Permit (A-5787)	1 (A-5787)
6/26/02	MAPP request to intervene in A-5787 (BV appeal of building permit)	13 (A-5787)
6/28/02	BOA issues Notice of Public Hearing in Case No. A-5787 for 10/9/02	5(b) (A-5787)
6/28/02	Horcasitas (MAPP) files appeal of Stop Work Order (BA Case No. 5794)	1 (A-5794)
7/11/02	BOA issues Notice of Public Hearing Scheduled in A-5794 for 10/9/02	11(b) (A-5794)
7/11/02	MAPP Files Request for Minor Modification to Special Exception to add parking spaces on special exception property for use by Office Building	31(b) (S-2351)
7/24/02	BOA Grants Intervenor Status to MAPP in building permit Appeal (A-5787) and Consolidates A-5787 with A-5794 (MAPP's appeal of Stop Work Order)	36 (A-5787)
8/13/02	MAPP initiates judicial action to interpret parking covenants	22 (A-5794)
9/16/02	DPS lifts stop work order	21 (A-5787)
9/25/02	BOA Approves MAPP's Request for Subpoena for Stephen Grayson	37 (A-5787)
10/1/02	BA Issues Notice of New Hearing Dates of 10/16/02 and 11/4/02 for in A-5787 and A-5794	14 (A-5787)
10/1/02	BV Letter to BOA Chairman and Director of DPS alleging violations of MAPP's special exception approval and requesting DPS to investigate violations	18 (A-5787)

<sup>14</sup> All exhibit references are to S-2351A unless otherwise noted. Where there are duplicate exhibits in different case files, only one reference to the exhibit is provided.

<b>DATE</b>	<b>ACTION TAKEN</b>	<b>EX. NO.<sup>14</sup></b>
10/2/02	BOA grants MAPP's request for a minor modification of the special exception	35 (S-2351)
10/2/02	BV files opposition to BOA's grant of MAPP's minor modification alleging violations of special exception approval	109
10/2/02	BV Letter to Robert Hubbard, Director of Dept. of Permitting Services, supplementing zoning complaint and requesting investigation of alleged special exception violations	19 (A-5787)
10/7/02	County's motion for continuance to allow Circuit Court to decide interpretation of parking covenants	22 (A-5794)
10/7/02	Letter from Susan Scala-Demby (DPS Permitting Services Manager) stating that DPS had lifted the Stop Work Order due to BOA's approval of MAPP's minor modification request.	23 (A-5787)
10/8/02	BV appeals DPS' decision to lift Stop Work Order (A-5832)	9(g) (A-5832)
10/8/02	BV's opposition to the County's Motion for Continuance	24 (A-5794)
10/8/02	MAPP joins in DPS' request for continuance	23 (A-5794)
10/16/02	BV letter to Susan Scala-Demby (DPS Permitting Services Mgr.) requesting reinstatement of Stop Work Order	22 (A-5787)
10/21/02	Letter from Abrams requesting continuance	7 (A-5787)
10/22/02	Scala-Demby response to BV's 10/16/02 letter agreeing to investigate alleged violations of MAPP's special exception approval	23 (A-5787)
10/24/02	BOA suspends its approval of MAPP's minor modification request	38 (S-2351)
10/25/02	BOA issues Notice of Public Hearing in A-5832 for 1/22/03	4(b) (A-5832)
10/29/02	BOA issues Notice of New Hearing Date of 1/22/03 in A-5787 and A-5794	9 (A-5787)
11/13/02	BOA denies MAPP's and County's 10/21/02 request for continuance. A-5787, A-5794, A-5832 and AS-2351 are all scheduled to be heard on 1/22/03 and BOA is capable of deciding zoning issues without reference to private covenants	38 (A-5787)
1/10/03	MAPP Request for continuance of all cases because MAPP is revising its special exception site plan to include all parking on the Office Building Area	37 (A-5794)
1/21/03	BV files opposition to MAPP's request for continuance	38 A-5794)
1/24/03	DPS issues Notice of Violation to MAPP for Special Exception Property	52, Attach. D
2/11/03	Letter from BV's attorney to assistant county attorney alleging that office building violated side and rear setbacks	4(b) (A-5886)
4/8/03	MAPP files request for major modification to its Special Exception (S-2351A)	1



<b>DATE</b>	<b>ACTION TAKEN</b>	<b>EX. NO.<sup>14</sup></b>
4/14/03	BV appeals DPS' decision not to issue a Stop Work Order and not to revoke building permit (A-5886)	1 (A-5886)
4/14/03	Letter from BV's attorney to Assistant County Attorney confirming (1) discussion that MAPP had violated 10-Foot setback on side property line of Office Building, (2) DPS' position that rear 30-foot setback was correct and (3) DPS' position that side and rear Setbacks had not been properly raised	4(a) (A-5886)
4/16/03	BOA adopts resolution a Resolution to Grant continuance in Cases A-5787, A-5794, A-5832, A-5886, and S-2351A and refers cases to Hearing Examiner	39 (A-5887)
6/10/03	Hearing Examiner issues Notice of Public Hearing for 7/30/03 in S-2351A	41 (A-5794)
6/24/03	BV letter to Assistant County Attorney requesting that occupancy of Office Building be limited to 4,000 s.f. until appeals are resolved	18 (A-5832)
6/27/03	BV files appeal of DPS' issuance of certificate of occupancy for Office Building	1 (A-5917)
7/9/03	BA approves Resolution to refer Case No. A-5794 to the Hearing Examiner and to expedite the public hearing in conjunction with other cases	5 (A-5917)
7/11/03	MAPP requests continuance of public hearing in order to submit modifications of special exception to address issues raised by Technical Staff	18
7/15/03	BV's opposes MAPP's request for continuance and requests that, if the HE grants continuance, occupancy in the Office Building be limited to 4,000 square feet	19
7/15/03	Montgomery County files statement supporting MAPP's request for continuance	20
7/16/03	BOA issues notice of public hearing for July 30, 2003	4(b) A-5917
7/24/03	MAPP files Motion to Amend Petition	21
7/24/03	HE issues Notice of Motion to Amend Petition	29
7/30/03	Notice of Rescheduled public hearing issued for all administrative appeals and special exception Modification. Rescheduled for 10/3/03 and 10/10/03 A-5787, A-5794, A-5832, A-5886	44 (A-5787)
9/11/03	Technical Staff Report recommends denial of MAPP's requests to modify its special exception to permit parking for the Office Building on the Special Exception Property	31
9/23/03	MAPP Motion to Amend Petition to accommodate changes addressing Technical Staff's comments	28
9/23/03	MAPP submits supplement to pre-hearing submission correcting the height of the canopy and requesting that as-built canopy be approved	30

<b>DATE</b>	<b>ACTION TAKEN</b>	<b>EX. NO.<sup>14</sup></b>
9/23/03	HE Issues Notice of Motion to Amend Petition	29
9/24/03	Planning Board recommends denial of MAPP's modification request	32
10/2/03	Public Hearing <ul style="list-style-type: none"> <li>• Parties agree to continue case to permit judicial resolution of interpretation of parking covenants</li> <li>• Continuance conditioned on revision of certificate of occupancy to limit occupancy of office building to no more than 4,666 square feet.</li> </ul>	
3/12/04	BV submits letter informing Hearing Examiner that the Circuit Court denied a Motion for Summary Judgment in the judicial action and scheduled the case for trial. During the trial, the matter was referred to mediation which was unsuccessful. Trial was rescheduled and MAPP was ordered to serve as a defendant another property owner subject to the parking covenants. The parties are awaiting new trial date.	39
1/9/08	The Court of Special Appeals issues a decision affirming the Circuit Court's decision in favor of BV	40(a)
4/1/08	BV's Motion to Recommence Proceedings	40
4/18/08	MAPP files a response to BV's Motion to Recommence Proceedings requesting a pre-hearing conference with the Hearing Examiner to clarify issues on appeal	
12/11/08	BV's second Motion to Recommence Proceedings	41
12/24/08	MAPP requests additional time to recommence proceedings because of substitution of engineer	42
1/30/09	MAPP files revisions to the special exception	43
3/12/09	HE issues Notice of Motion to Amend Petition and reschedules hearing for July 20, 2009	47
6/1/09	MAPP files supplement to petition requesting approval of as-built external mounted light fixtures	48
6/5/09	HE issues Notice of Motion to Amend Petition	49
6/22/09	MAPP submits corrections to data relating to size of the special exception area	50
6/29/09	HE issues Notice of Motion to Amend Petition	51
7/6/09	MAPP Submits Pre-hearing Statement	55
7/9/09	Planning Board recommends approval of modifications to special exception plan	58
7/14/09	HE issues Notice of Postponement of Public Hearing	56
7/20/09	MAPP submits revised plans to conform the special exception with the Planning Board's recommended conditions	57
8/4/09	Technical Staff advises that MAPP's revised lighting and landscape plan conforms with the conditions of approval recommended by the Planning Board	59
8/18/09	HE issues Notice of Motion to Amend Petition and reschedules public hearing for 10/5/09 and 10/6/09	60
9/30/09	Montgomery County files Motion to Dismiss Appeal No. A-5886	64.

<b>DATE</b>	<b>ACTION TAKEN</b>	<b>EX. NO.<sup>14</sup></b>
	because violations of setback requirements were not properly raised in Charging Document	
10/5/09	Public hearing convened; parties agree to continue case to April, 12, 2010, to permit an opportunity for the parties to settle the case	
3/3/10	BV notifies HE that parties were unable to reach a settlement of the case	70
4/2/10	BV files its Response to Montgomery County's Motion to Dismiss in BA A-5886	76
5/14/10	HE issues Notice of Public Hearing for 6/22/09, 6/24/09, and 7/1/10	78
6/14/10	HE issues Notice of Postponement of Public Hearing due to staffing changes in OZAH	79
10/26/10	HE issues Notice of Public Hearing for 10/29/10, 11/15/10 and 11/18/10	83
10/28/10	Montgomery County files a second Motion to Dismiss BA Case No. A-5886, alleging that state law prohibits litigation of setbacks more than five years after a permit is issued	85
10/29/10	Public Hearing	
11/9/10	MAPP submits revised lighting plan to Technical Staff for their review	99
11/10/10	BV files Supplemental Response to Montgomery County's Motion to Dismiss and Response to Montgomery County's Second Motion to Dismiss	101, 102
11/11/10	MAPP submits Memorandum in Support of Montgomery County's First and Second Motions to Dismiss Appeals	103
11/15/10	Hearing Examiner requests input from Technical Staff on calculating parking for convenience stores	110
11/17/10	Memorandum from MAPP on interpretation of calculation of parking for convenience store	111
11/17/10	Memorandum from BV on interpretation of calculation of parking for convenience store	112
11/18/10	Public hearing—revised site plan submitted	113
11/19/10	E-mail from Technical Staff approving revised lighting plan	126
11/19/10	Hearing Examiner e-mails Technical Staff requesting review of two alternative special exception site plans	127
12/7/10	E-mail from Technical Staff recommending approval of alternative special exception site plan	129
2/10/11	MAPP submits revised special exception plans	130
3/4/11	Public Hearing—Hearing Examiner requests BV's architect to submit portions of Americans with Disability Act and the Americans with Disability Act Accessibility Guidelines relied upon at the public hearing by 3/9/11; MAPP must submit revised parking plans by 3/21/11;	
3/9/11	BV submits portions of Americans with Disabilities Act and ADAAG guidelines	150
3/28/11	MAPP submits revised office building plans with parking space calculations	152

<b>DATE</b>	<b>ACTION TAKEN</b>	<b>EX. NO.<sup>14</sup></b>
4/4/11	BV submits its architect's response to MAPP's revised office building plans	153
4/7/11	Public Hearing: Closing arguments by the parties	